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TOWARD EFFECTIVE MUNICIPAL ZONING

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New York City with its 33,000 inhabitants was this nation's largest city when George Washington was inaugurated president.¹ Only a small fraction more than three per cent of our total population lived in cities numbering over 8,000 people,² and the total population of this vast, virgin land was less than four million.³ In those halcyon days of frontier philosophy, Thomas Jefferson proclaimed that Americans would "settle the lands in spite of everybody."⁴ No truer prophecy has been uttered by man.

Estimates vary, but if we assume that our normal population growth will continue for the next four decades, the United States will probably contain 320 million people, and its ten super-metropolitan areas will have 107 million inhabitants—one-third of our nation's total.⁵ Urbanities will compose about eighty-five per cent of our national population and this means not only more people, but more people concentrated in a relatively limited number of metropolitan areas.⁶ For example, by the year 2000, population growth will require an additional 55,000 square miles of land adjacent to metropolitan centers, and this need equals the entire land area of the state of Illinois—two per cent of the entire land area of the United States!⁷

The implications of such growth are staggering; one example will suffice. Apart from towering implications for efficient land use and transportation, the increased demand for water alone will surely produce a national crisis in water supply, previously available in abun-

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¹ II CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, Part 32-8, Table 4 (1950).

² BARTLEY, MUNICIPAL ZONING: FLORIDA LAW AND PRACTICE 9 (1950).

³ 1 MORRISON & COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 790 (1957). The figure for 1790 was 3,929,214, and today, of course, New York City numbers twice that figure.

⁴ Quoted from ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1936, 91 (1942).

⁵ PICKARD, METROPOLITANIZATION OF THE UNITED STATES 8 (1959); see also HATT & REISS, CITIES AND SOCIETY (1957), and HARLOW, THE GROWTH OF THE UNITED STATES (1943).

⁶ See Wirth, *Urbanism As a Way of Life*, in HATT & REISS, CITIES AND SOCIETY 46 (1957); "We have grown in the last decade by an amount nearly equal to our entire population one hundred years ago." Schlesinger, *The Big Issue*, Progressive, Sept., 1960, p. 9.

⁷ Assuming an overall average population density of new growth areas at 2,500 persons per square mile. PICKARD, *op. cit. supra* note 5. See, Fordham, *Decision-Making In Expanding American Urban Life*, 21 OHIO ST. L. J. 274 (1960).

dance. The predicted available supply of fresh water for 1980, just 20 years away, is 515-billion gallons per day. In 1900 we consumed 41 billion gallons of fresh water per day, in 1945 we were up to 150 billion gallons, but by 1980, water resource authorities predict that our fresh water needs will total more than 600 billion gallons per day!⁸ Simple arithmetic will show that daily demand will exceed the supply by some 85 billion gallons.⁹ Surely, outmoded carry-overs of frontier philosophy, with their generated legalisms, must give way to the requirements of this newly emerging world.¹⁰

Some people view these forecasts with alarm, others look upon them as golden opportunities, but certainly two things are beyond dispute: that "to be forewarned is to be forearmed," and that the legal adjustments which must be made to accommodate such growth will necessitate an informed and responsible legal leadership at all levels of national and community life. A rational approach is required. Planning and developing our metropolitan communities has already begun, and it is hoped that this article, which concentrates on one aspect of land-use planning, on a legal technique for securing comprehensive community design, *i.e.*, zoning, might contribute to the overall effort.¹¹

Zoning is a legal device which complements comprehensive planning by effectuating the plan,¹² and is the offspring of urgent urban necessity.¹³ In its ordinance form, it constitutes an exercise of the police power and consists primarily of classification. It envisions a division of land into districts, subjecting the land in each district to different

⁸ Barnhill, *National Crisis In Water Supply Coming*, 2 CURRENT MUNICIPAL PROBLEMS 107, 109 (1960).

⁹ One partial solution might lie in converting salt into fresh water; See *Progress In Salt Water Conversion Plants*, 2 CURRENT MUNICIPAL PROBLEMS 35 (1960).

¹⁰ Brief perusal of current water law doctrines will reveal their lack of comprehension of this problem and its magnitude. This is because they were frozen into shape by the issues of another era, and by themselves, cannot be expected to mold a sound future. See generally FARNHAM, *THE LAW OF WATER AND WATER RIGHTS* (1904); WIEL, *WATER RIGHTS IN THE WESTERN STATES* (3d ed. 1911), and Morris, *Washington Water Rights—A Sketch*, 31 WASH. L. REV. 243 (1956).

¹¹ Washington has not experienced a plethora of cases as have New Jersey, Florida and California, perhaps because there exists so little planning and zoning, or the zoning may be so excellent there is no need for litigation, or so poor no one has to fight to get what he wishes. But, there is an increasing number of cases, so that the practitioner imminently faces the likelihood of being confronted with a zoning problem.

¹² It is not the exclusive technique. Besides private covenants, public ownership, capital budgeting techniques, urban renewal and platting and subdivision laws, "Three of the major tools which are used to implement your planning program are: First, the zoning ordinance; second, the building code; and, third, the power of eminent domain through which such land as you need for parks and playgrounds, schools, hospitals, and parking lots may be condemned and acquired." BLUCHER, *COMPREHENSIVE COMMUNITY DEVELOPMENT PROGRAMS* at 40 in BUREAU OF GOV. RES. AND SERVICES, U. OF W., *PLANNING AS A SOLUTION TO STATE AND LOCAL PROBLEMS*, Rep. No. 83, 34 (1948). See also WEBSTER, *URBAN PLANNING AND MUNICIPAL PUBLIC POLICY* 265-312 (1958).

¹³ See *State v. Hillman*, 110 Conn. 92, 147 Atl. 294, 300 (1929).

regulations concerning its use.¹⁴ Considerations of district boundaries and use regulations are legislative in character, lying within the wisdom of a city council.¹⁵ Zoning generally must reflect an appreciation of the character of the land and its structures, its uniqueness for particular uses, plus regard for uniformity and equality within each use district.¹⁶ They are, of course, subject to judicial scrutiny to test whether they genuinely promote the public health, safety, morals or general welfare.¹⁷

THE SCOPE OF THE ZONING POWER

The constitutionality of comprehensive zoning became fertiley rooted in our jurisprudence after the United States Supreme Court, in 1926, decided a landmark case—*Village of Euclid v. Ambler Realty Co.*¹⁸ Although some notable state court decisions were early ground-breakers, upholding comprehensive zoning,¹⁹ the *Euclid* decision geysered through an otherwise inhospitable judicial attitude towards progressive social and economic legislation.²⁰ It settled once and for all that zoning, in principle, was constitutional.²¹

During 1922, the Euclid village council adopted a comprehensive zoning ordinance which divided the village land area into three overlapping categories, creating six separate use districts, three different

¹⁴ *Toulouse v. Board of Zoning Adjustment*, 147 Me. 387, 87 A.2d 670 (1952); *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 198 Atl. 225 (1938).

¹⁵ 1 YOKLEY, *ZONING LAW AND PRACTICE* 18 (2d ed. 1953); 1 RATHKOPF, *THE LAW OF ZONING AND PLANNING* 12-1, 16 (3d ed. 1959) [hereinafter cited as Yokley and Rathkopf respectively].

¹⁶ *Bogert v. Township of Washington*, 25 N.J. 57, 135 A.2d 1 (1957); *Northwest Merchants Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 A.2d 743 (1948).

¹⁷ *E.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹⁸ 272 U.S. 365 (1926). The vote was 6 to 3.

¹⁹ *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925); *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 Pac. 381 (1925); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923). But *contra* were, *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50 (1925); *Ignaciunas v. Risley*, 98 N.J.L. 712, 121 Atl. 783 (1923); and *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921).

²⁰ But *cf.* *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

²¹ One commentator, Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 699 (1930), heralds the foresight and liberalism in the Court's tolerant attitude, but another, more recent, observer, Miner, *Some Constitutional Aspects of Housing Legislation*, 39 ILL. L. REV. 305 at 311 (1945), criticizes Mr. Justice Sutherland's opinion for having related the zoning power too strictly to health and safety considerations thereby excluding zoning's "stabilizing effect on land values, of the beautification of a city through the orderly development of improvements and of aesthetic satisfaction in its bearing upon human well-being...." However, the Washington court has indicated that "the aesthetic taste is not to be frowned on nor classed as prejudice," *State ex rel. Seattle Title Trust Co. v. Roberge*, 144 Wash. 74, 80, 256 Pac. 781 783, *rev'd on other grounds*, 278 U.S. 116 (1927). It early indicated that zoning which seeks to maintain property values is proper. See *Shepard v. City of Seattle*, 59 Wash. 363, 109 Pac. 1067 (1910).

heights districts, and four distinct area districts. Ambler Realty Company, party plaintiff, owned 68 acres of land which, in the course of its natural development, was destined for industrial purposes and carried a market value of \$10,000 per acre. However, the zoning ordinance classified some of the plaintiff's land exclusively for residential purposes, thereby dropping its market value to \$2,500 per acre. The realty company sought to enjoin the ordinance as depriving it of property without due process of law and as denying it equal protection of the laws, derogating from the protections afforded by the 14th amendment because, allegedly, the measure diminished the prospective use of land. Although the case was couched in terms of an individual property owner, more was at stake than the various values on the 68 acres. Ambler Realty Company "represented a larger group seeking to destroy the zoning movement, and . . . the Euclid ordinance was chosen for this purpose because of certain weaknesses which were felt to inhere in its provisions."²²

The lower court ruled on the issues generally, and enjoined the comprehensive zoning plan in its entirety as a confiscation and general restraint on land. Consequently, when reviewing the matter, the Supreme Court passed only on the principle of zoning broadly and generally, questioning whether the plan was rooted in reasonableness and whether it bore a substantial relation to the public health, safety, morals or general welfare which might justify an exercise of the police power. The crux of the matter was the constitutional propriety of the police power restriction on plaintiff's land uses to residential purposes only and allowing others to enjoy both residential and industrial uses.²³ Noting that this decision involved the police power and thereby required a consideration of the ordinance "in connection with the circumstances and the locality"²⁴ plus passing on whether the ordinance had assumed the character of arbitrary fiat,²⁵ the Court concluded that it could not declare the ordinance so clearly arbitrary or unreasonable as to have no substantial relation to proper police power purposes, and upheld it.²⁶ Thus, the *Euclid* case "has set at rest the question of the right of cities to enact such legislation,"²⁷ and despite diminution in

²² Bettman, *The Decision of the Supreme Court of the United States in the Euclid Village Zoning Case*, 1 U. CINC. L. REV. 184 (1927).

²³ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

²⁴ *Id.* at 388.

²⁵ *Id.* at 389.

²⁶ *Id.* at 390-395.

²⁷ *State ex rel. Seattle Title Trust Co. v. Roberge*, 144 Wash. 74, 77, 256 Pac. 781, 782 (1927), *rev'd on other grounds*, 278 U.S. 116 (1928).

land values due to zoning,²⁸ "... the right to establish zoning districts is not an open question."²⁹

Since the remedy sought in *Euclid* was a generalized injunction against the ordinance in its entirety, only the constitutional right to zone was decided. The Court reserved its judgment on the constitutionality of individual sections of various zoning provisions and also on their applications to specific lands.³⁰ The latter situation soon came before the Court and is clearly illustrated by *Nectow v. City of Cambridge*.³¹ The Court found that, as applied, a specific zoning provision which included part of a singly-owned tract of land within a residential district, did not bear a reasonable relation to the promotion of health, safety, and welfare of the commonwealth.³² A small zone of land was in question and had been zoned "residential," evidently as protection for the well-established residential character of nearby lands. But the Court could see no reason why the boundary between "residential" and "industrial" zones should not be moved the 100 feet necessary to accommodate plaintiff, eliminating the safety margin. The Court refused to base its decision on the finding of a master, appointed by the trial court, that "no practical use can be made of the land in question for residential purposes," or on its own independent finding that zoning a portion of a solely-owned tract as "residential" was "not indispensable to the general plan" as revealed by its independent inspection of the plat.³³ Instead, the court said that the master's finding supported "by other findings of fact, is determinative of the case."³⁴ Hence, to the Court's mind, this provision, as applied, was found not to promote traditional police power purposes.

²⁸ In a case in which diminution of value was the sole question, the Court held that fact alone did not deny constitutionality to an ordinance which otherwise was not "clearly arbitrary and unreasonable." *Zahn v. Board of Pub. Works*, 274 U.S. 325, 328 (1927). In *Shepard v. City of Seattle*, *supra* note 21, at 373, 109 Pac. at 1070, the Washington court upheld an ordinance disallowing a private mental hospital in a residential zone because "the presence of such an institution... would practically destroy the value of all property within its immediate vicinity...."

²⁹ *State ex rel. Hardy v. Superior Court*, 155 Wash. 244, 247, 284 Pac. 93, 94 (1930). See also *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 242 P.2d 505 (1952); *State ex rel. Lane v. Fleming*, 129 Wash. 646, 225 Pac. 647 (1924); and *Hauser v. Arness*, 44 Wn.2d 358, 267 P.2d 691 (1954).

³⁰ *Village of Euclid v. Ambler Realty Co.*, *supra* note 18, at 395.

³¹ 277 U.S. 183 (1928). See also *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743 (1927), *cert. denied* 275 U.S. 569 (1927).

³² Plaintiff's procedural technique was a plea for a mandatory injunction directing the city and its building inspector to pass on a building permit application without regard for the ordinance if the building would otherwise be lawful. See, discussion *infra* at notes 139-150.

³³ *Nectow v. City of Cambridge*, *supra* note 31 at 188. "Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities...."

³⁴ *Ibid.*

This is hardly an adequate disposition of the case. In the first place, the *Euclid* decision contained an express statement that had a reasonable margin of land been included to insure effective zoning enforcement it would not invalidate a zoning provision.³⁵ Indeed, the court in *Nectow* refused to base its decision solely on the master's findings which had faced the issue squarely; instead, it indicated that "other findings of fact" were required. But the Court's opinion fails to reveal the nature and scope of the Court's inquiry or the character of other facts found, except for its general reference that the general plan would not be subverted if this land were not classed "residential." The reasoning which possibly might explain the how and the why lying behind this thinking remains a mystery, for clearly articulated explication had escaped the Court. Consequently, we must conclude that the Court in *Nectow* failed to indulge the *Euclid* dictum, and also failed to give deference to the legislature's judgment. In fact, it probably held the *Nectow* ordinance to some unknown constitutional standard which was higher than *Euclid's* requirement that, before the ordinance could be set aside, it must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."³⁶ In the second place, *Nectow* is really not much use for future prediction because we are left with the proposition that individual zoning classifications, as applied, must promote the "health, safety, convenience and general welfare of the inhabitants of the part of the city affected. . . ."³⁷ This vague generalization is not a very helpful guideline.

More important, however, is the consideration that most zoning boundary lines, considered in isolation of the total plan but solely in relation to the police power, can hardly be expected to locate the clear and persuasive measure by which they, individually, promote some particular police power purpose. Recognizing the importance of this consideration, the Washington court has said that "if courts were to consider each individual lot separate and apart from every other lot in a particular use district, and try to determine whether any given structure erected or to be erected on it is dangerous or inimical to the public health, safety, morals or welfare, there could be no successful zoning."³⁸ "The public welfare must be considered from the standpoint

³⁵ "The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-9 (1926).

³⁶ *Id.* at 395.

³⁷ *Nectow v. City of Cambridge*, *supra* note 31 at 188.

³⁸ *State ex rel. Miller v. Cain*, *supra* note 29 at 223.

of the objective of the zoning ordinance and of all the property within any particular use district."³⁹ Perhaps, as suggested, the real gist of the *Nectow* opinion lies in its deliberate vagueness and was intended by the Supreme Court only to be a cautionary measure, instructing state courts to be wary of abusive applications of the zoning power.⁴⁰

If this is so, another admonition came from the Court a year later. Where *Nectow* illustrates a successful constitutional attack on a zoning ordinance as applied, *State ex rel. Seattle Title Trust Co. v. Roberge*⁴¹ depicts a successful attack predicated on the face of a specific provision itself. Seattle passed a zoning ordinance setting up a "First Residence District" restricting this zoned land area to single family dwellings, but admitting philanthropic homes for children or old people "when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."⁴² Like *Euclid* and *Nectow*, this provision was attacked under the 14th amendment's "due process" and "equal protection" clauses. The Court struck down Seattle's ordinance holding that the delegation of power to surrounding land owners was arbitrary and "repugnant to the due process clause of the fourteenth amendment."⁴³

Again, the Court was impressed by the fact that exclusion of philanthropic homes was "not indispensable to the general zoning plan," but more important was the Court's view that the ordinance itself plainly implied that a philanthropic home would be consistent with the general welfare, but only if the adjacent property owners were to consent. The Court viewed the case as one which illustrated a delegation of power subjecting a nonconsenting land owner to the whim and caprice of his neighbors without standards and without the possibility of judicial review. Irrespective of its application, the Court thought the ordinance an unjustifiable restraint on a person's land use, bearing no substantial relation to traditional police power objectives.⁴⁴

³⁹ *Ibid.*

⁴⁰ Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 206 (1955).

⁴¹ 144 Wash. 74, 256 Pac. 781 (1927). *Rev'd* in 278 U.S. 116 (1928), see Annot., 86 A.L.R. 659-703 (1933).

⁴² 278 U.S. 116, 118 (1928). For the current approach of the Washington court to a similar problem compare *Chief Petroleum Corp. v. City of Walla Walla*, 10 Wn.2d 297, 116 P.2d 560 (1941), with *State ex rel. Lane v. Fleming*, 129 Wash. 646, 225 Pac. 647 (1924).

⁴³ *Id.* at 122.

⁴⁴ An analogous example is *Eubank v. City of Richmond*, 226 U.S. 137 (1912), striking a permissive ordinance which authorized two-thirds of the land owners abutting on a street to impose building restrictions upon the remaining land in a block. The converse situation was presented in *Cusack v. City of Chicago*, 242 U.S. 526 (1917).

These landmark cases delimit the constitutional considerations of zoning in a general way.⁴⁵ Constitutional issues may still arise in peculiar cases, but there can be no doubt that so long as the zoning ordinance is wisely drawn, including protective standards, and showing a substantial and reasonable relation to the promotion or protection of the traditional police power purposes, the Court will indulge presumptions to immunize it from constitutional attack.⁴⁶ Constitutionally considered then, zoning is unquestionably a proper exercise of the police power. But, what of police power?

Although the police power "is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government,"⁴⁷ it is also one of the most vague and ill defined.⁴⁸ Usually the "reasonable relationship" formula, requiring a reasonable relationship between the power's exercise and the objective sought, is merely a means of asking a question rather than being a dispassionate, objective answer. Moreover, the question's answer, more often than not, indicates that the court feels that the legislation under review, e.g., zoning, doesn't go too far in the Court's collective mind as the Court seeks to maintain its own notions of a fair balance between public and private interests.⁴⁹ Necessarily in these cases, the Court must

(1916), and the Court upheld an ordinance unqualifiedly prohibiting billboards in residential areas unless a majority of the lot owners authorized them. The Court reasoned that the latter case allowed landowners to remove a land restriction; whereas, *Eubank* authorized them to impose one. In *Roberge*, the Court distinguished *Cusack* characterizing *Roberge's* proposed philanthropic home as not being a nuisance, but billboards "by reason of their nature are liable to be offensive." *State of Washington v. Roberge*, 272 U.S. 116, 122 (1928). This last point has been called a "distinction without a difference" by Ernst Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 ILL. L. REV. 135, 143 (1929). The Court did not wrestle with the really interesting problem: Is it possible to reconcile majority rule, e.g., *Cusack*, with "due process" considerations when the latter operate to pre-empt areas from majority control?

⁴⁵ "It should be noted, however, that certainly not all conceivable constitutional problems had been solved." Savage, *Land Planning and Democratic Purposes*, 34 NOTRE DAME LAW. 65, 66 (1958), and for an introduction to the subtle ways in which judges can pave the way for legislative reforms which otherwise might be unconstitutional, see Cross, *The Interplay Between Property Law Change and Constitutional Barriers to Property Law Reform* (to be pub. in November issue of N.Y.U. L. Rev.).

⁴⁶ "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt." *The Sinking Fund Cases*, 99 U.S. 700, 718 (1897), see Note, *The Presumption of Constitutionality*, 31 COLUM. L. REV. 1136 (1931), and Note, *The Presumption of Constitutionality Reconsidered*, 36 COLUM. L. REV. 283 (1936).

⁴⁷ *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

⁴⁸ *Dickenson*, "Defect of Power" In *Constitutional Law*, 9 TEMP. L. Q. 388 (1935); Briggs, *States Rights*, 10 IOWA L. REV. 297 (1925). It is highly unlikely that clear, empirical referents will be found which distinctly separate "police power" from "eminent domain." See Freund, *supra* note 44 at 136, and WILLIAMS, *THE LAW OF CITY PLANNING AND ZONING* 25 (1922). Compare, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) with *Miller v. Schoene*, 276 U.S. 272 (1928).

⁴⁹ Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 836 (1924).

make policy decisions, passing, in part, on the wisdom of the legislative judgment in relation to the goals which the Court wishes to maximize.⁵⁰

However evasive and ubiquitous it is, we do know that municipalities have no constitutionally protected right to the police power. Constitutionally viewed, they are agencies of the states, and the Supreme Court has decided that they cannot invoke the "due process" clause⁵¹ or the "equal protection" clause⁵² against their sovereigns. In *Williams v. Baltimore*,⁵³ Mr. Justice Cardozo declared that a municipal corporation had "no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."⁵⁴ Consequently, a Washington city probably has neither the right "to insist that buildings constructed by the state be governed by the city building code"⁵⁵ nor that they be repaired in compliance with municipal ordinances.⁵⁶ But whenever they lie within municipal boundaries cities of the first class probably can zone state-owned and platted tide lands which are held in the state's "proprietary" capacity,⁵⁷ and lesser governmental entities, such as a school district, probably must comply with reasonable municipal building ordinances.⁵⁸

⁵⁰ This is not necessarily to be deplored even from the standpoint of a thoroughgoing believer in democracy. See BLACK, *THE PEOPLE AND THE COURT* (1960); Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW., 573 (1958); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952), but cf. Cohen, *Is Judicial Review Necessary?* BASIC ISSUES OF AMERICAN DEMOCRACY 202 (Bishop & Hendel ed. 1951).

⁵¹ "A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will." *City of Trenton v. New Jersey*, 262 U.S. 182, 187, (1923).

⁵² *City of Newark v. New Jersey*, 262 U.S. 192 (1923). Nor does power once delegated to a municipality via its statutory charter and later withdrawn impair the obligation of contracts under art. I, § 10 of the UNITED STATES CONSTITUTION. See *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

⁵³ 289 U.S. 36 (1933). The Washington court has said that, "A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. *Columbia Irr. Dist. Co. v. Benton County*, 149 Wash. 234, 235, 270 Pac. 813, 814 (1928). It has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution." *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656, 659 (1956); see generally Annotation, 116 A.L.R. 1037.

⁵⁴ *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933). For contours of an approach intimating that a municipality might insulate itself from state action, see, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), and Note, 33 WASH. L. REV. 117 (1958). See also Ylvisaker, *Some Criteria For a 'Proper' Area Division of Government Powers*, in AREA AND POWER 27 (Mass. ed., 1959).

⁵⁵ 47 WASH. ATT'Y GEN. OP. 17 (1947).

⁵⁶ 14 WASH. ATT'Y GEN. OP. 199 (1913).

⁵⁷ 46 WASH. ATT'Y GEN. OP. 511 (1946).

⁵⁸ 50 WASH. ATT'Y GEN. OP. 80 (1950); see *Shields v. Spokane School Dist.* 81, 31 Wn.2d 247, 196 P.2d 352 (1948).

But some few state courts have decided matters differently. Their opinions indicate that local government units possess a historically rooted, separate right to exercise police power. Supposedly, this right inheres in the very nature of a municipality itself.⁵⁹ The great weight of authority is against the inherent right doctrine,⁶⁰ and militates against any inherent limitation on the power of a state legislature to deal with the perplexing explosions of urban life which create today's staggering community problems. These gigantic issues usually transcend specific municipal boundaries and cannot be dealt with adequately by an authority, like local units, whose jurisdiction is less broad than is the scope of the problem. Today, the legal significance of the inherent home rule doctrine is anachronistic at best,⁶¹ if for no other reason than that most states, like Washington,⁶² have adopted express constitutional home rule provisions.⁶³ Consequently, questions concerning the scope, extent and propriety of a municipality's exercise of the police power will not be governed so much by its inherent right to do so as by considerations of whether the power was delegated for the purpose used.⁶⁴

The delegation can come from either of two sources: the state constitution or statute.⁶⁵ State constitutional provisions are generally referred to with catch-phrase appeal as "home rule" provisions, often sloganeering an analytical mind off its guard. These constitutional provisions which usually empower localities to frame and adopt charters,⁶⁶

⁵⁹ State *ex rel.* Kern v. Arnold, 100 Mont. 346, 49 P.2d 976 (1935), but cf. Helena Housing Authority v. City of Helena, 108 Mont. 347, 90 P.2d 514 (1939). See also Geake v. Fox, 158 Ind. 126, 63 N.E. 19 (1902) and State v. Barker, 116 Iowa 96, 89 N.W. 204 (1902). Apparently the idea was first put forward by Cooley, J., in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103 (1871). The inherent right theory has been warmly embraced by Eaton, *The Origin of Municipal Incorporation in England and the United States*, 25 REP. AM. BAR ASS'N 292 (1902) and McQuillan, *Constitutional Right of Local Self-Government of Municipalities*, 35 AM. L. REV. 510 (1901), but, equally vigorously rejected in McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916).

⁶⁰ See *Redell v. Moorer*, 63 Neb. 219, 88 N.W. 243 (1901). The United States Supreme Court has not passed on the matter.

⁶¹ But cf. MOTT, *HOME RULE FOR AMERICA'S CITIES* (1949); however compare, Walker, *Let Cities Manage Themselves*, 36 NAT'L MUN. REV. 625 (1946).

⁶² WASH. CONST. art. XI, § 10. The inherent right doctrine has been rejected by the Washington court. See State *ex rel.* Clausen v. Burr, 65 Wash. 524, 526-527, 118 Pac. 639, 640 (1911), ignoring its prior approval by citation and dictum, in *City of Olympia v. Mann*, 1 Wash. 389, 398, 25 Pac. 337, 343 (1890).

⁶³ See ADRIAN, *GOVERNING URBAN AMERICA* 152-162 (1955).

⁶⁴ 1 YORLEY 24. See generally Trautman, *Administrative Law Problems of Delegation and Implementation in Washington*, 33 WASH. L. REV. 33 (1958).

⁶⁵ A state's power to zone has been construed as being inherently derived from its power to create a municipality. *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 198 Atl. 225 (1938).

⁶⁶ See WASH. CONST. art. XI, § 10.

fall into two general classes: First, there are those that specifically set forth the procedures to be followed for framing charters,⁶⁷ and second, there are others which grant the right to frame a charter but rely upon the legislature to provide the machinery for an exercise of that right.⁶⁸ The catching appeal of "home rule" has produced a spate of state constitutional amendments, and local self-government provisions can be found in twenty-four state constitutions.⁶⁹

The Washington constitution contains at least two provisions relevant to any discussion of a municipality's possession and exercise of the police power. One—the "home rule" provision—applies to cities over 20,000 and enables these localities to frame their own charters.⁷⁰ The other section contains a general grant of the police power to "any county, city, town, or township," enabling these named units to frame all ordinances which "are not in conflict with the general laws."⁷¹

The home rule provision was early construed as falling within the second general type of constitutional provisions set out above, providing only the right, and not the machinery, for exercising the right to self-government.⁷² Since this provision is not self-executing,⁷³ reliance is thereby placed on the Washington legislature to provide machinery to make this right effective. In fact, by making predominant a qualification that city charters framed under this provision are "controlled by general laws," the Washington court has effectively nullified any separate grant of power and has insured the supremacy of the State legislature. This controlling interpretation pretty much restricts the section to one which grants qualified Washington cities the right to choose their form of local government, but vests no additional powers. The result is a notion that a "charter framed under the constitutional provision is of no more or larger force than a legislative charter, and can lawfully treat only of matters relating to the internal management

⁶⁷ *E.g.*, OHIO CONST. art. XVIII, but for its emasculation see *State v. Krause*, 130 Ohio 455, 200 N.E. 512 (1936), and Lowrie, *Interpretation of the County Home Rule Amendment by the Ohio Supreme Court*, 10 U. CINC. L. REV. 454 (1936).

⁶⁸ *E.g.*, MICH. CONST. art. VIII and W. VA. CONST. art. VI, § 39(a).

⁶⁹ Collected in 1 ANTIEU, *MUNICIPAL CORPORATION LAW* 95-96 (1955) and see discussion of "home rule" at pp. 95-164.

⁷⁰ WASH. CONST. art. XI, § 10.

⁷¹ WASH. CONST. art. XI, § 11.

⁷² See *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064 (1891); *State ex rel. Snell v. Warner*, 4 Wash. 773, 31 Pac. 25 (1892); *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23 (1896); *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625 (1895); *Ewing v. City of Seattle*, 55 Wash. 229, 104 Pac. 259 (1909); and *Oakwood Co. v. Tacoma Mausoleum Ass'n*, 22 Wn.2d 692, 157 P.2d 595 (1945).

⁷³ "Nor do we think the contention that the constitutional provision is self-executing, and that legislative interference is unauthorized can be upheld." *Reeves v. Anderson*, *supra* note 72, at 23, 42 Pac. at 629.

and control of municipal affairs. . . ."⁷⁴ This means then, that this provision will not sustain an attempt to create local tribunals to decide contested election cases where a state statute has so provided,⁷⁵ neither will it sustain an attempt to extend municipal boundaries by the creation of a new charter contra to state annexation procedures,⁷⁶ nor will it empower the use of eminent domain power without a separate statutory grant.⁷⁷

Although it is unquestionably true that "in practice as well as in law home rule in Washington has been and is more largely a matter of legislative grace than of constitutional right,"⁷⁸ this is not necessarily to be deplored.⁷⁹ Indeed, one penetrating analyst has pointed out that the home rule movement is in discordant dislocation with modern ideas on public administration which stress flexibility and adaptability in governmental affairs at the cost of fixed geographical patterns.⁸⁰ Washington's present doctrinal position is farsighted and means that its home rule provision does not amount to an inhibiting constitutional grant of power to municipalities which, when properly exercised on purely local matters, would pre-empt conflicting state statutes.⁸¹ Were the alternative construction followed, the Washington legislature would have been paralyzed in its attempt to deal with our mounting urban-city problems which cut across municipal borders. The result would have been an ineffective, satellitized approach to problems transcending the boundaries of any given community, but had not, as yet, reached "state-wide" proportions. In addition, by eliminating the pre-emption issue, the Washington courts are not called upon to indulge the fiction which allocates and reallocates governing power under the

⁷⁴ *In re Cloherty*, supra note 72, at 140, 27 Pac. at 1065.

⁷⁵ *State ex rel. Fawcett v. Superior Court*, supra note 72.

⁷⁶ *State ex rel. Snell v. Warner*, supra note 72.

⁷⁷ *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. 848 (1892).

⁷⁸ MCBAIN, *THE LAW AND PRACTICE OF HOME RULE* 455 (1916).

⁷⁹ *But cf.* Comment, *Home Rule in Washington—at the Whim of the Legislature*, 29 WASH. L. REV. 295 (1954).

⁸⁰ Fordham, *The West Virginia Municipal Home Rule Proposal*, 38 W. VA. L. Q. 235, 237-38 (1932); Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L. J. 18 (1948). *But cf.* Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66 (1952), and Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571 (1955). *Quaere*, Is "home-rule" compatible with the realities of modern Metropolitanism?

⁸¹ *Anderson v. City of Two Harbors*, 244 Minn. 496, 70 N.W.2d 414 (1955); *Wiley v. Berkeley*, 136 Cal. App.2d 10, 288 P.2d 123 (1955); and *State v. Carran*, 133 Ohio 50, 11 N.E.2d 245 (1937). However, where municipalities are wholly controlled by state legislatures, a statute always prevails over an ordinance. *Hemphill v. Wabash R.R.*, 209 F.2d 768 (7th Cir. 1954) *cert. denied*, 347 U.S. 954 (1954) and *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861 (1912).

"purely local" versus "state-wide concern" formula.⁸² The point is that, in Washington, the conduct of local governmental affairs is freed, in this specific regard, from the additional time consuming and expensive process of submitting prospective municipal measures to judicial scrutiny by means of friendly test suits for the purpose of determining whether the measures should have been enacted by a city council or the state legislature. The attendant gain in effectiveness of Washington's democratic processes portends obvious implications for meaningful zoning.⁸³

By contrast with Washington's "home rule" provision, our other constitutional provision⁸⁴ grants municipalities the police power, and interestingly enough, its construction has been contrary to the home rule provision. It is self executing.⁸⁵ This direct delegation of the police power to municipalities is as ample within its limits as that possessed by the state legislature itself.⁸⁶ The constitutional provision vests the police power in the named localities whether the governmental unit has framed its own charter⁸⁷ or not.⁸⁸ Consequently, municipali-

⁸² Pre-emption doctrine is two-edged. Ordinances relating to "purely local affairs" pre-empt conflicting state statutes, but a state statute on a matter "really" of "state-wide concern" pre-empts the local ordinance, if in conflict. See Comment, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).

⁸³ It should be obvious that the extent to which a state legislature's representation is apportioned, or gerrymandered, to represent acreage and not people, then there can be no assurance our mounting metro-urban problems will be met. See Darrer and Kelsay, *Unrepresentative States*, 44 NAT'L MUN. REV. 571 (1955). Obstacles to reapportionment are huge, and besides an understandable lack of enthusiasm from rural areas, one study reveals a special interest bloc between rural powers and such groups as chambers of commerce, farm bureaus, motor truck ass'ns, teachers' ass'ns, and county and town officials' ass'n. Bureau of Gov. Res., Ind. U., *Apportionment and Reapportionment in Indiana: Political Implications* 3 (1947). In California, "Certain business interests in the state have found it easier to make their influence felt in the legislature through senators from rural areas." McHenry, *Urban v. Rural in California*, 35 NAT'L MUN. REV. 353 (1946). Reapportionment of rotten boroughs is patently imperative for "legislatures must meet the needs of all inhabitants, not just the cornfields." Baker, *RURAL VERSUS URBAN POLITICAL POWER* 14 (1952), and the United States Supreme Court has refused to do the job, *Colegrove v. Green*, 328 U.S. 549 (1946). The fear of urban domination stymies realistic reapportionment; perhaps, Illinois' cumulative voting system could effect a compromise. See Blair, *Patterns of Party Allegiance*, 52 AM. POL. SCI. REV. 123 (1958). But, probably reapportionment must come from the people, by initiative. Yet, where legislatures have power to amend successful reapportionment initiatives no genuine changes can be expected. See, e.g., *State ex rel. O'Connell v. Meyers*, 51 Wn.2d 454, 319 P.2d 828 (1957), and Note, 34 WASH. L. REV. 150 (1959).

⁸⁴ WASH. CONST. art. XI, § 11.

⁸⁵ "...for whatever authority the city has in respect of its police power, it has by virtue of art. XI, § 11, of our constitution, independent of any statutory grant." *Patton v. City of Bellingham*, 179 Wash. 566, 570, 38 P.2d 364, 365 (1934); *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462 (1915).

⁸⁶ *City of Seattle v. Proctor*, 183 Wash. 293, 48 P.2d 238 (1935); *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 Pac. 976 (1922).

⁸⁷ See *City of Spokane v. Coon*, 3 Wn.2d 243, 100 P.2d 36 (1940); *Brennan v. City of Seattle*, 151 Wash. 665, 276 Pac. 886 (1929); *Shepard v. City of Seattle*, 59 Wash. 363, 109 Pac. 1067 (1910).

⁸⁸ *Continental Baking Co. v. City of Mt. Vernon*, 182 Wash. 68, 44 P.2d 821 (1935).

ties need not always await enabling legislation before acting on local problems; however, should a statute be subsequently passed, any ordinance, if in conflict,⁸⁹ must give way to the general law.⁹⁰ Again, by a construction which relies on the supremacy of "general law," the Washington court has avoided rigid complexity in local affairs as well as the pre-emption issue, and has insured flexibility in local government administration at the expense of local vested interests.

Court construction of this section has not enjoyed a consistent history, however, and confusion was injected when the court dealt with questions of extraterritoriality. Recent rapid expansion of cities has transformed conceptions of land-use planning and zoning from their exclusive intra-city applications to ideas which require planning the surrounding, undeveloped area lying on a municipality's fringe.⁹¹ Statutes quite commonly authorize cities not only to acquire and operate municipal property outside of the city limits for such local purposes, *inter alia*, as water supply, sewage and garbage dumps,⁹² but also confer planning and zoning powers over fringe areas from three to five miles beyond the city's borders.⁹³ This approach, though effective, quite obviously gives rise to serious jurisdictional disputes between cities and rural residents who dislike city-imposed restrictions on land use;⁹⁴ between competing cities seeking to exercise their extraterritorial powers over the same agricultural land;⁹⁵ and between two cities with a common boundary line but having differing ideas about the way in which its adjacent lands should be developed.⁹⁶ These problems

⁸⁹ Washington court discussions of "conflict" are sparse. But municipalities concurrently may legislate with the state on a subject matter enlarging on a statute and no "conflict" will result, unless the statute operates as a "limitation" in which case the ordinance must give way. See *State ex rel. Isham v. City of Spokane*, 2 Wn.2d 392, 98 P.2d 306 (1940); *City of Seattle v. Proctor*, 183 Wash. 299, 48 P.2d 241 (1935), compare *Miller v. City of Spokane*, 35 Wn.2d 113, 211 P.2d 165 (1949) *appeal dismissed* 339 U.S. 907 (1949).

⁹⁰ *City of Seattle v. Ross*, 54 Wn.2d 655, 344 P.2d 216 (1959); *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 304 P.2d 656 (1956).

⁹¹ See generally Bartelt, *Extraterritorial Zoning*, 32 NOTRE DAME LAW. 367 (1957); Bowsma, *Validity of Extraterritorial Municipal Zoning*, 8 VAND. L. REV. 806 (1955); Hemingway, *Extraterritorial Powers of a Municipality*, 24 KY. L. J. 107 (1936), and Anderson, *Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 (1926).

⁹² If no express authority exists, courts have not hesitated to imply it. *Austin v. Shaw*, 235 N.C. 722, 71 S.E.2d 25 (1952); *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (1945); *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940), and 1957 U. ILL. L.F. 99.

⁹³ See Annot., 55 A.L.R. 1182; Hannah, *Legal Devices for Controlling the Use of Farmland*, 38 VA. L. REV. 451 (1952), and Note, 41 HARV. L. REV. 894 (1928).

⁹⁴ HORACK & NOLAN, *LAND USE CONTROLS* 99-106 (1955).

⁹⁵ "A typical case is Lake County, Indiana, where fourteen cities (including Gary, Hammond, East Chicago) each contest for authority over adjacent rural areas and the rural residents seek to prevent all urban control." *Id.* at 58, n. 25.

⁹⁶ *Cresskill v. Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (1953). Perhaps regional commissions are a partial answer, see RCW 35.63.070, but in Washington they rest on the willing cooperation of all units involved.

probably will not arise in Washington because it is highly unlikely that attempts will be made to grant cities extraterritorial powers to zone. The outstanding case is *Brown v. City of Cle Elum*.⁹⁷

Cle Elum, then a city of the third class, obtained its water supply from Lake Cle Elum, located about six miles northwest of the city limits, and upon which there had been considerable swimming, fishing and boating. Seeking to protect its inhabitants from polluted water, the city passed an ordinance prohibiting all contamination of lake waters under pain of fine or imprisonment.⁹⁸ The measure was expressly authorized by a statute which allowed an extraterritorial exercise of the police power.⁹⁹ For the first time, and then on re-hearing, the court passed on "whether or not the legislature can constitutionally delegate to a city authority to exercise police power beyond its territorial limits and outside the boundaries of property it may own beyond its territorial limits by the passing and enforcing of ordinances assuming to regulate the conduct of citizens beyond such limits and boundaries."¹⁰⁰ In a cryptic, two-page per curiam opinion, the court answered in the negative.

The city sought to uphold its ordinance by arguing that it was expressly authorized by statute; however, the court felt that "those sections of the code have no validity, however, in view of the constitutional provision, art. XI, sec. 11. . . ."¹⁰¹ This provision which expressly *grants* police power to *municipalities* was construed to operate as a *limitation* on subsequent delegations of power to cities by the legislature.¹⁰² This view imparts reasoning which necessitates the premise that not only must constitutionally granted power be exercised exclusively within a city's limits, but also, so must legislatively granted powers, and attempts to delegate extraterritorial powers probably would be void. If

⁹⁷ 145 Wash. 588, 261 Pac. 112 (1927) overruling *Brown v. City of Cle Elum*, 143 Wash. 606, 255 Pac. 961 (1927); noted in 41 HARV. L. REV. 894 (1928). See also 49 WASH. ATT'Y GEN. OP. 12 (1949).

⁹⁸ § 2 read: "That the following acts shall constitute offenses against the purity of such water supply: swimming, fishing, and boating in Cle Elum Lake; dumping raw sewage into any lake, river, spring, stream, creek or tributary constituting the source of supply of water of the City of Cle Elum, or camping on the shores of said streams, lakes, . . ." *Brown v. City of Cle Elum*, 143 Wash. 606, 255 Pac. 961, 962 (1927).

⁹⁹ *Id.* at 610, 255 Pac. at 963, REM. COMP. STAT. §§ 9127 and 9473 authorized cities to pass penal ordinances protecting their water supplies "whether the same, or any part thereof, lie within the corporate limits of such town or city or outside thereof. . . ."

¹⁰⁰ *Brown v. City of Cle Elum*, 145 Wash. 606, 261 Pac. 112 (1927).

¹⁰¹ *Id.* at 589, 261 Pac. at 112.

¹⁰² The constitutional provision itself, goes only to constitutionally *granted* power. The court did not feel compelled to discuss why the legislature could not additionally expand the constitutional grant of power, nor was there discussion of the justification for construing the provision as a limitation on legislative power to delegate.

this interpretation of the case be the correct one, then there can be no delegation of power in Washington to cities for zoning extraterritorial lands. However, it is possible that this case can be restricted solely to attempts to give extraterritorial effects to *penal* ordinances. But the court's reasoning is generalized, and by its own terms, it would apply to all ordinances. In any event, even this latter interpretation would inhibit extraterritorial zoning, for zoning ordinances usually carry misdemeanor sanctions for their violations. My equivocation here comes from the court's last paragraph where, without illustrations, it said, "the effect of holding this ordinance invalid will not be, of course, to render the municipalities powerless from interference . . . but, without a constitutional amendment, penal ordinances . . . cannot be given extraterritorial effect."¹⁰³ Art XI, sec. 11, is not, on its face, restricted to penal ordinances; however, given judicial attitude so disposed, future litigation may so restrict it, and *Brown v. Cle Elum*, to such a view.

ZONING IN ACCORDANCE WITH A COMPREHENSIVE PLAN

Quite apart from the constitutional delegation of police power to municipalities, supplemental legal authority to zone was expressly delegated in 1935 by the Washington legislature.¹⁰⁴ However, enactments of zoning ordinances certainly antedated this general planning and zoning enabling legislation. Much early zoning occurred on a selective, ad hoc basis and repeatedly involved the establishment of municipal "fire limits." These ordinances were enacted in an attempt to curb fire by prohibiting the construction of wooden buildings within certain established zones labeled, "fire limits." The measures have been upheld¹⁰⁵ since early times,¹⁰⁶ even to the extent of declaring a newly constructed building which was erected contrary to the prohibition to be a nuisance, authorizing its removal, and assessing removal costs against the owner who constructed it in violation of the ordi-

¹⁰³ *Brown v. City of Cle Elum*, 145 Wash. 588, 591, 261 Pac. 112, 113 (1927).

¹⁰⁴ RCW 35.63; Wash. Sess. Laws 1935 c. 44.

¹⁰⁵ *City of Olympia v. Mann*, 1 Wash. 389, 25 Pac. 337 (1890); *Baxter v. City of Seattle*, 3 Wash. 352, 28 Pac. 537 (1891); *Davison v. City of Walla Walla*, 52 Wash. 453, 100 Pac. 981 (1909); *Shepard v. City of Seattle*, 59 Wash. 363, 109 Pac. 1067 (1910); *Nolan v. Blackwell*, 123 Wash. 504, 212 Pac. 1048 (1923); *City of Seattle v. Seibert*, 129 Wash. 346, 225 Pac. 67 (1924).

¹⁰⁶ The die was cast in 1890 when the court could not see that Olympia's "fire limit" ordinance "was passed in a spirit of wanton disregard of proprietary rights." *City of Olympia v. Mann*, *supra* note 105 at 399, 25 Pac. at 340.

nance.¹⁰⁷ Later, the court approved "fire limit" ordinances which prohibited repairs on wooden buildings which had been damaged by fire when the damage exceeded some council-approved ratio of the building's prior value.¹⁰⁸ It should be pointed out that these early attempts at zoning were piecemeal, and on a pragmatically expedient basis. The most important point here is that these first zoning ordinances were not viewed as tools used to implement a comprehensive community design. Comprehensive planning was still in its infancy, but zoning had already become widespread, sometimes with less than admirable results. "The great tragedy of most of the zoning in the United States is that it was developed before we had any community plans to serve as the framework for the zoning ordinance."¹⁰⁹

The beginning linkage of comprehensive planning tied to rational zoning was introduced by Washington's major cities just after the turn of this century. Operating under the constitution's home rule provision, Seattle, in 1910, adopted a charter amendment creating a municipal planning commission, and charged it with the task of developing a comprehensive plan for the city's future growth. Fourteen of the planning commission's twenty-one members were to be appointed by the mayor from a list of candidates recommended by certain business and professional groups, which were designated by the charter amendment. Supposedly, each named organization would nominate two people, one of whom would then be selected by the mayor.¹¹⁰ Litigation ensued. The trial court sustained a demurrer to a complaint, and on appeal, the charter amendment was attacked along several fronts: (1) although persons ultimately selected for the planning commission had to be Seattle citizens, there was no requirement that the organization membership, itself, had to be comprised of local citizens; consequently, it was alleged, this procedure allowed non-citizens—both non-citizen to Seattle and perhaps to the state—to direct municipal

¹⁰⁷ *Baxter v. City of Seattle*, *supra* note 105. See also Taggart, *Legal Machinery for the Enforcement of the Zoning Ordinance* at 19-29 in Bureau of Gov. Res. and Services, U.W., *Zoning Administration and Enforcement*, Info. Bull. No. 164 (Feb. 15, 1954).

¹⁰⁸ Thirty per cent was approved "when it is remembered that the purpose of a fire-limit is to prevent the destruction of human life and property by fire." *Davison v. City of Walla Walla*, *supra* note 105 at 456, 100 Pac. at 982. This rationale would justify any ratio for it does not deal with the question of degree which was before the court, but with the existence of the power to impose any ratio. Later, the burden of proof showing the necessary destruction (fifty per cent) was put on the city. *DeVon v. Town of Oroville*, 120 Wash. 317, 270 Pac. 231 (1922). But failure to provide a mode of computation by ordinance does not render the measure unconstitutional. *Behrend v. Town of Pe Ell*, 136 Wash. 364, 240 Pac. 12 (1925).

¹⁰⁹ BLUCHER, *COMPREHENSIVE COMMUNITY DEVELOPMENT PROGRAMS*, *supra* note 12.

¹¹⁰ See *Bussell v. Gill*, 58 Wash. 468, 471, 108 Pac. 1080, 1081, 1082 (1910).

affairs (the charter had authorized non-citizen members of these groups to nominate two persons for the city's planning commission); (2) to the extent the planning commission was empowered to spend funds, it was argued that, for the same reasons, the new charter provisions authorized expenditures of municipal funds by non-elected, non-residents, and finally, (3) that by granting the nomination privilege to the named groups, the charter amendment discriminated against other non-named organizations contrary to the privileges and immunity section of the Washington constitution.¹¹¹

The Washington court made surprisingly short work of these arguments. Since the charter amendment had been approved by the voters, even though non-residents participated in the nominating process, the court failed "to see how, in the absence of an express constitutional inhibition, that fact invalidates the charter amendment."¹¹² As far as the second point was concerned, the court could "find no merit in this contention."¹¹³ Nor could it sustain the argument based on the privileges and immunity section of the Washington constitution because the court believed that those words should receive the same meaning as the terms had obtained in the federal constitution's fourteenth amendment!¹¹⁴ To the court's mind, the right of recommendation, conferred by the charter amendment, was not by its nature, so fundamental a right of a citizen to have been within the mind of the framers of that federal organic law, and hence, the right of recommendation received no constitutional protection. The net result of this litigation provided court approval of a procedure which enabled cities of the first class, by charter amendment, to develop planning commissions which might coordinate zoning and comprehensive planning. But even so, there were still many remaining problems, and cities of the lower classes would probably have to await enabling legislation before they could link comprehensive planning and zoning.

¹¹¹ WASH. CONST. art. I, § 12.

¹¹² *Bussell v. Gill*, *supra* note 110 at 474, 108 Pac. at 1083.

¹¹³ *Id.* at 475, 108 Pac. at 1083. Here the court doubtfully relied on *State v. Ripplinger*, 30 Wash. 281, 70 Pac. 748 (1902) which compelled Seattle's comptroller to issue warrants on the city treasury solely upon certification of the library board, without council action. But, that case did not deal with the question of the power of municipal voters to authorize non-residents to draw on city funds; that was admitted in *Ripplinger*, but was the issue in *Bussell*. The issue in *Ripplinger* was whether the charter section authorizing fund disbursements by the librarian was "in conflict . . . with and repugnant to the [subsequent] provisions, being the last expression of the law making power on that subject." *State v. Ripplinger*, 30 Wash. 281, 287, 70 Pac. 748, 749 (1902).

¹¹⁴ *Bussell v. Gill*, *supra* note 105 at 476, 108 Pac. at 1083. This approach is contra to that of the United States Supreme Court which is based on notions of dual citizen-

In the winter of 1935, the Washington legislature authorized local communities to establish a city or county planning commission of from three to twelve members.¹¹⁵ These commissions are empowered to make investigations, collate data, and develop and recommend to the local legislature a comprehensive community plan.¹¹⁶ The act is simply a bit of permissive legislation and sets out proper procedures only in a most general way. Yet, though general, strict compliance is necessary, else enacted ordinances will be invalid.¹¹⁷ Except as otherwise provided by statute, the establishment of the specifics of zoning procedure is left to the discretion of cities, and they fit the details of procedure to their individual requirements.

The Washington legislature, however, has followed the customary path of providing for certain guarantees of citizen participation in the zoning process. Through its staff which operates as a research and fact-finding agency, the Planning Commission is an investigatory body and thereby serves as an instrument of preliminary public adjustment.¹¹⁸ When conducting the required hearings, property owners can make their desires known to the planning commission well before any action is taken by either the commission or the city council. Having notified and heard all persons interested and having synthesized other research materials, the commission then prepares comprehensive plans and preliminary drafts of zoning ordinances which, in turn, can be presented to the council. Under these circumstances, a zoning ordinance is more likely to obtain a consensus of community opinion, than if the council were to enact ordinances without coordinated studies. Citizen participation in the formulation of plans is the paramount reason which underlies the statutory requirement that the commission shall hold at least one public hearing on the initial plan before recommending it to the local legislature. Once presented to the council and after having been found to promote the end purposes of zoning,

ship resulting in separate state and federal citizenship rights, privileges and obligations. See *Corfield v. Coryell*, 4 Wash. C.C. 371 (1823); *Slaughter House Cases*, 16 Wall. 36 (1873); and the *Civil Rights Cases*, 109 U.S. 3 (1883). Seemingly, the Washington court recognized this interpretation of the *Slaughter House Cases* when it relied on them seventeen years earlier in *City of Spokane v. Robison*, 6 Wash. 547, 33 Pac. 960 (1893).

¹¹⁵ RCW 35.63; Wash. Sess. Laws 1935 c. 44, § 9.

¹¹⁶ RCW 35.63.060.

¹¹⁷ See 8 McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* 66-8 (3d ed. 1950).

¹¹⁸ RCW 35.63.100 requires notice and hearing before the planning commission before it can recommend a plan to the council, and RCW 35.63.120 requires notice and a redundant second hearing, this time before the council, prior to action on a commission's proposal.

the plan can become the basis of further zoning activity. After a second public hearing, the local legislature, by ordinance or resolution, "may divide the municipality or any portion thereof into [zoning] districts. . . ." ¹¹⁹

Until recently, the relationship between the planning commission and the council, or board of county commissioners, has been unclear, resulting in several problems, one of which was squarely presented in *Lauterbach v. City of Centralia*.¹²⁰ The 1935 enabling act provided, in part, that any ordinance adopting any plan "or any part thereof, may be amended, supplemented or modified by subsequent ordinance or resolution adopted *upon recommendation of or with the concurrence of the commission*."¹²¹ [Emphasis added] In August of 1949, both after having set up a planning commission and after having passed a zoning ordinance, thereby taking advantage of the powers conferred by the enabling statute, the Centralia city commission passed ordinances indicating that "the City Commission may, . . . after public hearing, and with the concurrence of the Planning Commission, change . . . zoning districts and "the regulations herein established."¹²² Five years later, on April 20, 1954, the City Commission passed two ordinances. One, an amendatory ordinance to the 1949 provision eliminated the necessity of obtaining the planning commission's concurrence before changing zoning district boundary lines, and the other, a substantive measure, sought to rezone some land, part of which was owned by plaintiff, from a residential-use to a commercial-use district. Plaintiff contended that the 1954 ordinances were illegal and void as a matter of law because the planning commission had refused to join in the rezoning plans. The changes were, in fact, adopted over the express objections of the planning commission.¹²³ The trial court agreed, enjoining the ordinances. Centralia appealed, arguing that the statute, as construed, was unconstitutional because such an interpretation would contravene its constitutional grant of police power. The Washington Supreme Court affirmed, answering the city's contentions by saying that "the city did not purport to exercise its police power, regardless of the statute."¹²⁴ And, in any event, the statute was

¹¹⁹ RCW 35.63.110.

¹²⁰ 49 Wn.2d 550, 304 P.2d 656 (1956), and see, *Lillions v. Gibbs*, 47 Wn.2d 629, 289 P.2d 203 (1955).

¹²¹ Wash. Sess. Laws 1935 c. 44, § 9; RRS § 9322-9; cf. RCW 35.63.120.

¹²² *Lauterbach v. City of Centralia*, *supra* note 120, at 552, 304 P.2d at 658.

¹²³ *Id.* at 556-557, 304 Pac. at 660.

¹²⁴ *Id.* at 555, 304 Pac. at 659.

"a general law," *i.e.*, a limitation upon the constitutional grant, hence, "there is no interference by the legislature with the police power of the city."¹²⁵

More important was the court's holding that a city commission could not amend a zoning provision contrary to the recommendation or without the concurrence of the planning commission.¹²⁶ Construing the word "upon" as connoting the same as "on condition that," the court held that the statute created a state of dependence requiring "a recommendation that action be taken before the ordinance may be amended."¹²⁷ It should be noted here that the planning commission's recommendations operated as a condition precedent to the city commission's action. The commission could not exercise its power to zone without meeting the necessary condition, but the city commission was in no way compelled to act and accept a recommendation of the planning commission. In this latter sense, the action of the planning commission was advisory. This last point was decided a year earlier, in a case which involved an interpretation of the permissive word "may" found earlier in the statute.¹²⁸

There are obvious gains to be derived by tying a council's actions to the precedent condition of a planning commission's recommendations. Petty politics and insidious pressures are dampened or controlled, and also, a more dispassionate and a more equal supervision of the zoning laws usually can be obtained, resulting in a greater realization of over-all community goals. This necessarily is at the sacrifice of some council discretion and its so-called aspects of "political responsibility." In fact, were frequent amendments made to zoning ordinances which truly reflected fluctuating "political responsibility," they would probably destroy a carefully prepared professional plan, and be declared void as attempts at spot zoning which bear no reasonable relation to the over-all general welfare. Nonetheless, the Washington legislature has not stood ready to make the sacrifice. Consequently, in 1957, the statute was amended, and today, "the council or board . . . may affirm, modify or disaffirm any decision of the commission."¹²⁹

¹²⁵ *Ibid.* But cf. dissenting opinion at 559-62, 304 Pac. at 662-63.

¹²⁶ *Id.* at 557-9, 304 Pac. at 661-2.

¹²⁷ *Ibid.*

¹²⁸ *Lillions v. Gibbs*, *supra* note 120.

¹²⁹ See, RCW 35.63.120. No cases have interpreted this new provision. It could have been more effectively drafted for currently two public hearings are required before a city may zone in accordance with a comprehensive plan, see note 118 *supra*. Other than being superfluously time consuming, the second hearing before the council sub-

Spot zoning,¹³⁰ a vicious practice, may soon present problems which will receive more attention in Washington, since the legislature's severance of the city council from the planning commission. Although pressures for amendments may be great, if a comprehensive plan is properly prepared there will be few justifications for amending zoning ordinances. If amendments are made, they must be consistent with overall community development,¹³¹ and "the question is always what will best serve the public interests, not what may be the desires of a particular group residing in the vicinity of the area sought to be zoned."¹³² The Washington court has disapproved of spot zoning,¹³³ indicating that even though some persons reap unjustified benefits from the practice going undetected, that fact alone does not preclude enforcing the ordinance against others.¹³⁴ Notwithstanding these admonitions, most lawyers, utterly unaware of the proper way to initiate a zoning amendment, think they are advancing their client's cause when they describe his land with particularity in their petitions for rezoning. Thus conceived, their request is a patent solicitation for spot zoning, placing both the planning commission and the city council in an untenable position. Occasionally a sympathetic commission will bail them out by initiating a suggestion that the rezoning request include at least one block, perhaps more. To be properly prepared, the lawyer should consult all land owners in the proposed area for rezoning; secure their consent for his plans, and then be prepared to advance to the council the nature of the community benefits which will flow from his rezoning proposal. Otherwise, he runs a great risk of failure should the matter be subjected to judicial review.

jects a professionally prepared plan to political pressures which may hotly favor the interests of a vocal few, to the public detriment. Responsible council decisions in such circumstances become more difficult, at best.

¹³⁰ For succinct analysis of "spot zoning" see *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950); and *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 175 P.2d 542 (1946); 1 *YORLEY* 202-224.

¹³¹ Attempts to "spot zone" have been almost universally condemned for failure to meet this criterion. See *Cassel v. Mayor of Baltimore*, 195 Md. 348, 73 A.2d 486 (1950); *Edgewood Civic Club v. Blaisdell*, 95 N.H. 244, 61 A.2d 517 (1948); *Polk v. Axton*, 306 Ky. 498, 208 S.W.2d 497 (1948); *Page v. City of Portland*, 178 Ore. 632, 165 P.2d 280 (1948), and Annot.: 128 A.L.R. 740 (1940); 149 A.L.R. 292 (1944).

¹³² *State ex rel. Warner v. Hayes*, 13 Wn.2d 306, 316, 125 P.2d 262, 266 (1942) (said in another context). Generally zoning amendments have contributed to overall neighborhood decline; see Comment, 48 Nw. U.L. Rev. 470, 474 (1953).

¹³³ See *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 225, 242, P.2d 505, 510 (1952). Also, *Harris v. Skirving*, 41 Wn.2d 200, 248 P.2d 408 (1952) was an attempt to invalidate particular spot zoning amendments on the ground that the spot would create a nuisance.

¹³⁴ *State ex rel. Miller v. Cain*, *supra* note 133; see, *Safeway Stores v. City Council of City of San Mateo*, 86 Cal. App.2d 277, 194 P.2d 720 (1948); and *Ventresca v. Exley*, 358 Pa. 98, 56 A.2d 210 (1948). Annot., 119 A.L.R. 1509 (1939).

JUDICIAL REVIEW OF ZONING ORDINANCES

Since "the operating principle of modern zoning regulations is in some respects the antithesis of the rugged individualism of pioneer, frontier times,"¹³⁵ the attitude which prevails during judicial review of zoning ordinances plays a crucial role in determining the factual effectiveness of land-use planning. Sadly enough, evidence is still presented which shows that some courts continue a bias prejudicial to the fundamental postulates of zoning,¹³⁶ and a few of them continue, under the guise of judicial review, to substitute their judgment for that discretion which properly resides in another body politic.¹³⁷ In Washington, however, a more salutary attitude prevails, and the court ordinarily will not substitute its judgment for that of zoning authorities.¹³⁸

But, before there can be any judicial review of a local governing body's action, one must first get before a court. There can be no appeal from a refusal to rezone, regardless of how meritorious the rezoning plea might be.¹³⁹ Consequently, aggrieved parties, having the proper standing to sue,¹⁴⁰ must attack either the zoning ordinance itself or a refusal to act under it. One may seek to enjoin enforcement of zoning measures as they are applied to specific lands,¹⁴¹ or pursue mandamus compelling an issuance of a permit.¹⁴² In addition, suits at law for declaratory judgments are possible,¹⁴³ or one might couple a

¹³⁵ *Pearson v. Evans*, 51 Wn.2d 574, 577, 320 P.2d 300, 302 (1958) (dissenting opinion).

¹³⁶ *E.g.*, see, *City & County of Denver v. Denver Buick, Inc.*, 347 P.2d 919 at 943 (Colo. 1959); Note, 35 NOTRE DAME LAW. 477 (1960).

¹³⁷ *City & County of Denver v. Perlmutter Construction Co.*, 131 Colo. 230, 280 P.2d 1107 (1955); and *Jones v. Board of Adj.*, 119 Colo. 420, 204 P.2d 560 (1949).

¹³⁸ *But cf.*, *Shields v. Spokane School Dist. No. 81*, 31 Wn.2d 247, 196 P.2d 352 (1948); see note 171, *infra*.

¹³⁹ *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955).

¹⁴⁰ See *State v. Lovelase*, 118 Wash. 50, 203 Pac. 28 (1921); see Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362 (1960), see generally *id.* 379-86.

¹⁴¹ *Nectow v. City of Cambridge*, *supra* note 31 was a suit for a mandatory injunction; for prohibitory injunctions see, generally, *City Cab, Carriage and Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472 (1913) and cases cited, note 29 *supra*. But, before a citizen can obtain injunctive relief against a zoning ordinance, he must establish special damages to his person or property. *Desimone v. City of Seattle*, 35 Wn.2d 579, 213 P.2d 948 (1950).

¹⁴² See *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 312 P.2d 195 (1957); *State ex rel. Brinker v. Town of Oak Harbor*, 48 Wn.2d 839, 296 P.2d 1004 (1956); *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954); and *Annots.*, 86 A.L.R. 792 (1933); 136 A.L.R. 1378 (1942). Compare *Hester v. Thomson*, 35 Wash. 119, 76 Pac. 734 (1904) (mandamus) with *State ex rel. Grimmer v. City of Spokane*, 64 Wash. 388, 116 Pac. 878 (1911) (writ of prohibition).

¹⁴³ See *State ex rel. Lyon v. Board of County Commissioners of Pierce County*, 31 Wn.2d 366, 373, 196 P.2d 997, 1001 (1948), and *Annot.*, 114 A.L.R. 1361 (1938).

suit for a declaratory judgment with a request for an injunction, thereby enforcing, in the same suit, one's rights along with their declaration.¹⁴⁴ As between two private property owners, an injunction¹⁴⁵ or an action to abate a nuisance¹⁴⁶ will lie to enforce valid zoning provisions against prohibited land uses, the measures themselves being subject to attack by way of defense.¹⁴⁷

Conversely, municipal authorities may initiate zoning suits and prosecute for violations of an ordinance,¹⁴⁸ or seek injunctions prohibiting a land owner from violating an ordinance,¹⁴⁹ or require the removal of a structure which violates a zoning provision.¹⁵⁰

A special avenue which ought not to be overlooked is that of nuisance, for no meager measure of zoning has been accomplished by judges through nuisance cases.¹⁵¹ These are not merely the usual next-door-neighbor type irritations,¹⁵² but cases of multiple plaintiffs¹⁵³ which focus judicial eyes onto land uses within an entire district, rather than on the usually myopic area owned by a single plaintiff.¹⁵⁴ Some courts continue to adjudicate nuisance cases in vague and scrambled doctrinal terms relating "gravity of harm" to "social utility of conduct," rather than honestly facing the problem of producing a functionally integrated land-use pattern.¹⁵⁵ But careful analysis shows that, simi-

¹⁴⁴ RCW 7.24. However, copies of the complaint must be served on the attorney general. *Roehl v. Public Utility Dist. No. 1*, 43 Wn.2d 214, 261 P.2d 92 (1953), and see, 1 ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 834-849 (2d ed. 1951).

¹⁴⁵ See *Harris v. Skirving*, 41 Wn.2d 200, 248 P.2d 408 (1952); *Park v. Stolzheise*, 24 Wn.2d 781, 167 P.2d 412 (1946); *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 Pac. 976 (1922); *Annot.*, 129 A.L.R. 885 (1940).

¹⁴⁶ See *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959); *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956). This includes an anticipated nuisance; see, *Turner v. City of Spokane*, 39 Wn.2d 332, 235 P.2d 300 (1951).

¹⁴⁷ *State ex rel. Warner v. Hayes Inv. Corp.*, 13 Wn.2d 306, 125 P.2d 306 (1942).

¹⁴⁸ *City of Everett v. Unsworth*, 54 Wn.2d 760, 344 P.2d 728 (1959); *City of Spokane v. Coon*, 3 Wn.2d 243, 100 P.2d 36 (1940).

¹⁴⁹ *King County v. Lunn*, 32 Wn.2d 116, 200 P.2d 981 (1948).

¹⁵⁰ *City of Everett v. Unsworth*, *supra* note 148 at 764, 344 P.2d at 730; *Baxter v. City of Seattle*, 3 Wash. 352, 28 Pac. 537 (1891); and *Davison v. City of Walla Walla*, 52 Wash. 453, 100 Pac. 981 (1909). See, Van Soelen, *Abatement of Buildings as Public Nuisances*, 38 DICTA 237 (1960).

¹⁵¹ *Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440.

¹⁵² *E.g.*, "Consider for example the case of the big red rooster, *Myer v. Minard*, 21 So. 2d 72 (La. 1945) where the plaintiff's only complaint was that defendant's big red rooster crowed always at 5 A.M. and every fifteen minutes thereafter until 6:30 A.M. The Court said that the rooster's cheery outbursts at the break of day cannot be sufficiently disturbing to a person of ordinary sensibilities, normal habits and tastes to be a nuisance. *Quare*, is there proof here that the average judge is too old to sleep beyond daybreak?" *Id.* at 441, n. 8.

¹⁵³ *E.g.*, *National Container Corp. v. State ex rel. Stockton*, 138 Fla. 32, 189 So. 4 (1939) had 90 plaintiffs.

¹⁵⁴ Note the broad considerations in *Harris v. Skirving*, *supra* note 145.

¹⁵⁵ "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" PROSSER, TORTS 389 (2d ed. 1955).

lar to planning commissions, the judicial mind in its painful pin-pricking process is becoming sensitive to considerations regarding the "character of the neighborhood."¹⁵⁶ As this desirable trend becomes stronger, due to more intensive land-use demands, nuisance doctrine probably will come to reflect a functional treatment of land-use adjudication, fully influenced by, and integrated with, notions of modern comprehensive planning.¹⁵⁷ Then truly, the doctrines of private nuisance will cease to be regarded as relating solely to tortious conduct. Instead, they will realistically be viewed as describing the property interest invaded by a wrongdoer, being viewed from a functionally integrated vantage point.¹⁵⁸

In Washington, a plaintiff can sue on nuisance theory arguing either, (1) that a violation of a zoning ordinance is a nuisance per se,¹⁵⁹ or (2) that a land use constitutes a common law nuisance in fact.¹⁶⁰ He may pursue an injunctive remedy upon a showing of special damages to him, *e.g.*, diminution in value of his property resulting from a zoning violation,¹⁶¹ or, alternatively, he can pursue damages.¹⁶² But the fact of diminished land value alone, though relative to establishing the fact of nuisance, is not in and of itself sufficient.¹⁶³ "The fundamental inquiry in cases of this kind is whether the use to which the property is put is reasonable or unreasonable."¹⁶⁴ By itself, this statement implies only that the matter is subject to judicial review; however, in deciding what was reasonable, the court looked to "the character of the neighborhood," to determine whether the specific use was func-

¹⁵⁶ *Morin v. Johnson*, 49 Wn.2d 275, 281, 300 P.2d 569, 572 (1956), and *Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases*, 1955 Wis. L. Rev. 440.

¹⁵⁷ But, we might query the relative expertise of judicial zoning via nuisance doctrine which necessarily rests on lawyer manipulation of partisan testimony, against that expertness residing in the planning commission using the zoning approach.

¹⁵⁸ See *RESTATEMENT, TORTS* § 822 (1939), and *PROSSER, TORTS*, 389-401 (2 ed. 1955).

¹⁵⁹ *Steele v. Queen City Broadcasting Co.*, *supra* note 146. But compare *Park v. Stolzheise*, *supra* note 145, with *Turner v. City of Spokane*, *supra* note 146.

¹⁶⁰ The leading case is *Shields v. Spokane School Dist. No. 81*, *supra* note 138; *Harris v. Skirving*, *supra* note 145, *Morin v. Johnson*, *supra* note 156 (on appeal, the court treated this case, in part, as one of nuisance per se).

¹⁶¹ *Desimone v. City of Seattle*, 35 Wn.2d 579, 213 P.2d 948 (1958), and see, *Annot.*, 129 A.L.R. 885 (1940). But cf. *Morin v. Johnson*, *supra* note 156, where the court approved, as harmless error, a trial court's disallowance of proof showing diminished land value.

¹⁶² *Steele v. Queen City Broadcasting Co.*, *supra* note 146.

¹⁶³ "Any business may be so carried on as not to be a nuisance, and yet may impair the value of adjoining property." *Morin v. Johnson*, *supra* note 156 at 282, 300 P.2d at 573.

¹⁶⁴ *Id.* at 280, 300 P.2d at 571; see also *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873 (1958) (disallowing plaintiff's attempt to abate advertisement atop parking meters).

tionally integrated into the over-all land pattern and its prospective growth.¹⁶⁵

A recent case indicates that a city of the first class, when exercising its police power, may declare a land use to be a nuisance and abate it, or impose fines, without resort to the courts.¹⁶⁶ But in an earlier case, the court said that the decision whether a land use is or is not a nuisance in violation of a zoning ordinance, is a conclusion of law and not a finding of fact, even though termed that by a lower court.¹⁶⁷ Accordingly, the separation of powers doctrine would necessitate that only the courts can declare a specific land use to be a nuisance. This appears the better view¹⁶⁸ and does not detract from the long standing power of a local legislature to declare, by ordinance, that certain land uses generally constitute a nuisance.¹⁶⁹ To hold otherwise would disregard the constitutional grant of police power to municipalities. Not only can a municipality declare legislatively what constitutes a nuisance, but also it can legitimate a land use that otherwise could have been abated,¹⁷⁰ for nothing maintained under the express authority of a statute or ordinance can be deemed a nuisance.¹⁷¹ Given the above propositions, nuisance doctrines provide a basis for private enforcement of zoning ordinances, eliminating nonconforming uses, provided always that the zoning ordinance itself be valid.

The grounds which can be used for attacking a zoning measure vary considerably, but when the constitutionality of an ordinance is challenged, the burden on the complainant is heavy. He must show the municipality's action to be unreasonable and arbitrary, and that its reasonableness is not fairly debatable.¹⁷² For if the matter be fairly

¹⁶⁵ *Id.* at 281, 300 P.2d at 572.

¹⁶⁶ *City of Everett v. Unsworth*, *supra* note 148 at 764, 344 P.2d at 730; see, RCW 35.22.280(31) and *Davison v. City of Walla Walla*, 52 Wash. 453, 100 Pac. 981 (1909). This was held not to abridge WASH. CONST. amend. 28 requiring all actions to abate a nuisance to be brought in the superior court. Compare RCW 35.22.460 in the case where an ordinance defines a nuisance, since this statute confers jurisdiction over municipally defined violations onto municipal courts.

¹⁶⁷ *Hauser v. Arness*, 44 Wn.2d 358, 267 P.2d 691 (1954); *Wygall v. Kilwein*, 41 Wn.2d 281, 248 P.2d 893 (1952).

¹⁶⁸ See *City of Everett v. Unsworth*, *supra* note 148 at 763, 300 P.2d at 730.

¹⁶⁹ *E.g.*, *Shepard v. City of Seattle*, 569 Wash. 363, 109 Pac. 1067 (1910); *DeVon v. Town of Oroville*, 120 Wash. 317, 207 Pac. 231 (1922).

¹⁷⁰ *E.g.*, an undertaking parlor. *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 Pac. 976 (1922).

¹⁷¹ However, this appears qualified by the "nuisance in law vs. nuisance in fact" dichotomy of *Shields v. Spokane School Dist. No. 81*, *supra* note 138. A "nuisance in fact" qualifies under the zoning ordinance, but appears in an "improper place or manner"; i.e., to the judicial mind. Wherever the zoning ordinance specifically enumerates the allowable uses included within a zone, the use of the *Shields* distinction results in a blatant substitute of judicial judgment for that of a planning commission.

¹⁷² 1 YORLEY 469-476; 1 RATHKOPF 21, 2-41.

debatable, the legislative judgment must stand.¹⁷³ A parade of horrible possibilities is not a sound reason for invalidating an ordinance. "There is time enough to deal with the possibilities if they become realities."¹⁷⁴

Perhaps more so than other ordinances, zoning provisions must comply fully with all requisite procedural steps.¹⁷⁵ Every zoning ordinance must be integrated with a zoning map which identifies the areas in which restrictive land uses are imposed.¹⁷⁶ A city council cannot act beyond the scope of authority delegated it by the constitution or enabling legislation.¹⁷⁷ Nor may it sub-delegate the power to zone.¹⁷⁸ And, state statutes, though general, must be rigorously followed, else enacted measures will be invalid. However, if a town clerk fails to keep a statutorily required ordinance book for recordation purposes, the failure to record a zoning ordinance in it will not make the measure null and void in absence of a statute so declaring.¹⁷⁹ Also, it should be noted that challenges to procedure must be specific; for a general denial answering a pleading which has alleged proper passage of an ordinance, "merely questions the power of the city to pass the ordinance, not that the preliminary steps were not properly taken."¹⁸⁰ Generally, until the contrary is shown, the usual construction prevails—that the ordinance was properly enacted and lies within the city's

¹⁷³ *Ibid.*

¹⁷⁴ *Winkenwerder v. City of Yakima*, *supra* note 164 at 625, 328 P.2d at 879.

¹⁷⁵ See *Savage v. City of Tacoma*, 61 Wash. 1, 112 Pac. 78 (1910); *Tennent v. City of Seattle*, 83 Wash. 108, 145 Pac. 83 (1914). Zoning ordinances are of two types: inclusive and exclusive. The inclusive ones permit specifically enumerated uses within the district, all others being excluded; exclusive ordinances exclude certain uses, permitting any other use not specifically excluded. Inclusive measures put the burden on the landowner to show that his proposed use qualifies, and they are probably unfair in that it is impossible for a council to specify every proper, future use of land. Yet, exclusive ordinances are unfair too, because odious future uses not contemplated by the council are not excluded, and a city may suffer a noxious use. Most ordinances are of the inclusive type, see HORACK & NOLAN, *LAND USE CONTROLS* 46 (1955); see generally, 1 YOKLEY 77; BASSETT, *MODEL LAWS FOR PLANNING CITIES* (Harv. Planning Series, 1935).

¹⁷⁶ RCW 35.63.090 provides: "All regulations shall be worked out as parts of a comprehensive plan..." See Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); 1 RATHKOFF 9-1. The zoning map should be distinguished from the land-use map, made as part of the master plan. The land-use map depicts existing uses of individual parcels of land, but the zoning map shows general classifications of allowable land uses within districts.

¹⁷⁷ *Bishop v. Board of Zoning Appeals of New Haven*, 133 Conn. 614, 53 A.2d 659 (1947).

¹⁷⁸ *Blitch v. City of Ocala*, 142 Fla. 612, 195 So. 406 (1940); *In re Wilson*, 32 Minn. 145, 19 N.W. 723 (1884).

¹⁷⁹ *DeVon v. Town of Oroville*, 120 Wash. 317, 207 Pac. 231 (1922). (The original was introduced into evidence.)

¹⁸⁰ *Davison v. City of Walla Walla*, 52 Wash. 453, at 455, 100 Pac. 981 (1909). Plaintiffs must show that the procedural irregularity affected the section under which they are aggrieved. *State v. Lovelace*, 118 Wash. 50, 203 Pac. 28 (1921).

powers,¹⁸¹ having been passed in good faith.¹⁸²

It is notorious that rules of statutory construction do not actually decide cases and that they are in hopeless confusion.¹⁸³ Likewise, the presumptive validity of zoning ordinances is neither as effective nor as clear as one might wish. At the outset it should be marked that ordinances are not treated like statutes in one respect. Courts do not take judicial notice of municipal zoning ordinances, and, like all other facts, they must be pleaded and proved.¹⁸⁴ "It is, of course, the general rule that every presumption is in favor of the constitutionality of a law or ordinance,"¹⁸⁵ and where a measure admits of two constructions, one rendering it constitutional and the other not, the constitutional construction will be preferred.¹⁸⁶ But, since zoning ordinances derogate against, and restrict, traditional common law conceptions of allowable land uses,¹⁸⁷ exceptions have been made to the general rule. The disturbing fact about this development is that one is never really quite sure whether the court will invoke the general rule or one of its exceptions. Zoning ordinances "should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language;"¹⁸⁸ yet, the court has also maintained that "they should be liberally construed to accomplish their plain purpose and intent."¹⁸⁹ It is probably unwise to place such great faith in the crystalline character of words.¹⁹⁰ Court adumbrations on the presumptive legitimacy of zoning measures have been inconsistent. The court's vacillation has resulted in an existing set of complementary opposite

¹⁸¹ *State v. Lawton*, 25 Wn.2d 750, 172 P.2d 465 (1946); *Wood v. City of Seattle*, 23 Wash. 1, 62 Pac. 135 (1900).

¹⁸² *Cornelius v. City of Seattle*, 123 Wash. 550, 213 Pac. 17 (1923); *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18 (1917).

¹⁸³ Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 528 (1947); and Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

¹⁸⁴ If the pleading goes to number, date and title, then the court will take judicial notice, if the ordinance be properly recorded. *Knight v. Pang*, 32 Wn.2d 217, 201 P.2d 198 (1948); *Dixon v. City of Bremerton*, 25 Wn.2d 508, 171 P.2d 243 (1946); 1 YORLEY 465.

¹⁸⁵ *City of Spokane v. Coon*, 3 Wn.2d 243, 100 P.2d 36 (1940); accord, *McDermott v. State*, 197 Wash. 79, 84 P.2d 372 (1938); *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936).

¹⁸⁶ *Hauser v. Arness*, 44 Wn.2d 358, 370, 267 P.2d 691, 698 (1954).

¹⁸⁷ See McDougal, *The Influence of Metropolis on Concepts, Rules and Institutions Relating to Property*, 4 J. OF PUB. LAW 93 (1955), and Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1954).

¹⁸⁸ *Hauser v. Arness*, *supra* note 186 at 370, 267 P.2d at 698.

¹⁸⁹ *Id.* at 370, 267 P.2d at 698.

¹⁹⁰ See KORZYBSKI, *SCIENCE AND SANITY* (1944); MORRIS, *FOUNDATION OF THE THEORY OF SIGNS*, 1 INT'L ENCY. OF UNIFIED SCIENCE, No. 2 (1938); Compare ARNOLD, *The Traps Which Lie in Definitions and Polar Words in THE FOLKLORE OF CAPITALISM* 165-184 (1937) with Goodhart, *The Importance of a Definition of Law*, 3 J. AFRICAN ADMIN. 106 (1951).

presumptions,¹⁹¹ one which can be indulged to favor constitutionality,¹⁹² and the other—"zoning ordinances are in derogation of the common law and must be strictly construed"¹⁹³—can be invoked to cast the die against a zoning provision, denying a community the realization of its comprehensive planning.

In the absence of fraud patently perpetrated,¹⁹⁴ the Washington court early decided that it will not strike a zoning provision, valid on its face, because the court disapproves of a council's motives lying behind the measure.¹⁹⁵ And, although mandamus will lie to review an arbitrary or capricious exercise of a council's discretion,¹⁹⁶ it will not lie to compel a general course of official conduct such as the proper supervision of a "no parking" ordinance.¹⁹⁷ The writ is available, however, to compel a proper exercise of discretion where previously it has been exercised arbitrarily.¹⁹⁸ But, it cannot be used to compel a city to rezone specific lots, however fair, reasonable, and desirable the change may be.¹⁹⁹ Consequently, local units have a cudgel over a property owner and can refuse to rezone his highway frontage lands from a residential to an industrial use until the land owner, at his expense, either provides for the necessary drainage or grants the city an easement for a drainage ditch across one of his lots.²⁰⁰ In such a case, a council's motives are deemed irrelevant to its failure to rezone, but the court has authorized other grounds which will upset zoning legislation.

The heart of any zoning ordinance lies in the decision of local authorities concerning the nature of the uses to be permitted within designated districts. If a city is to be divided "according to classification," what are the proper determinants of the districts? Unques-

¹⁹¹ See OLIPHANT & HEWITT, FOREWARD TO RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1929).

¹⁹² *E.g.*, Seattle *ex rel.* Miller v. Cain, 40 Wn.2d 216, 242 P.2d 505 (1952).

¹⁹³ Pearson v. Evans, 51 Wn.2d 574, 576, 320 P.2d 300, 301 (1958). This is the majority rule.

¹⁹⁴ Kimmell v. City of Spokane, 7 Wn.2d 372, 109 P.2d 1069 (1941); Blade v. Town of La Conner, 167 Wash. 403, 9 P.2d 381 (1932).

¹⁹⁵ City of Olympia v. Mann, 1 Wash. 389, 25 Pac. 337 (1890); *accord*, Shepard v. City of Seattle, 58 Wash. 501, 109 Pac. 1067 (1910).

¹⁹⁶ State *ex rel.* Brinker v. Town of Oak Harbor, 48 Wn.2d 839, 296 P.2d 1004 (1956).

¹⁹⁷ State *ex rel.* Beardslee v. Landes, 149 Wash. 570, 271 Pac. 829 (1928). This results from court incapacity to supervise and oversee its decree, and the separation of powers doctrine. Compare the undertaking in Brown v. Board of Educ., 347 U.S. 483 (1954).

¹⁹⁸ Hester v. Thomson, 35 Wash. 119, 76 Pac. 734 (1904).

¹⁹⁹ Besselman v. City of Moses Lake, 46 Wn.2d 279, 280 P.2d 689 (1955).

²⁰⁰ *Ibid.* Of course, the city could have condemned the easement, but then, it would have had to pay for it.

tionably, the primary principle playing a predominate role in all cases involving the propriety of zoning measures is that all municipal authority to restrict the use of private lands must be based upon a valid exercise of the police power—and this harbingers a discussion of reasonableness. Thoughts in this area can be classified within the traditional trilogy of grounds for attacking the zoning ordinances. Once all the procedural steps have been followed by a governing body, a properly enacted zoning ordinance can be invalidated in (1) that the ordinance transcends the power delegated by the constitution or zoning enabling legislation, and, consequently, is *ultra vires*,²⁰¹ (2) that the use district classifications have not been based upon reasonable distinctions,²⁰² or (3) that regulations within a particular use district have no substantial relation to traditional police power purposes; hence, they deprive a property owner without due process of law²⁰³ or their lack of uniformity denies him the law's equal protection.²⁰⁴ Nevertheless, whatever the neatness involved in these classifications, the fundamental consideration within each of these categories actually considered by the Washington court, is whether the action in question bears a reasonable relation to the health, safety, morals or general welfare of the community.

Since the constitutional grant is subject to "general law" and municipalities have no inherent possession of police power, and since zoning measures regulate the otherwise free use of property, municipal zoning ordinances must follow enabling statutes strictly. No other justification for such power exists.²⁰⁵ The Washington legislature has granted broad authority to local governments to impose land-use restrictions.²⁰⁶ Nevertheless, the cases from other jurisdictions dealing with attempts completely to exclude a land use from a zoning classification indicate that a municipality's power is not plenary, nor subject to exercise unreasonably.

One of the most recurring problems involves the reasonableness of attempts to exclude churches from one zone, *e.g.*, prime residential districts, while permitting them in other zones, *e.g.*, lesser residential or commercial classifications.²⁰⁷ The central issue in determining the

²⁰¹ 1 YOKLEY 37-39; 1 RATHKOFF 8-6.

²⁰² 1 RATHKOFF 12-1; The fourteenth amendment denies municipalities zoning power to segregate on the basis of race, *Buchanan v. Warley*, 245 U.S. 60 (1917).

²⁰³ 1 RATHKOFF 6-20.

²⁰⁴ 1 RATHKOFF 7-1; see *Manos v. City of Seattle*, 173 Wash. 662, 24 P.2d 91 (1933).

²⁰⁵ 1 YOKLEY 37.

²⁰⁶ RCW 35.63.080.

²⁰⁷ 1 YOKLEY 110; 1 RATHKOFF 19-259.

validity of a zoning ordinance seeking wholly to exclude churches from first residential areas would seem to deal with the first amendment's guarantee of religious freedom. But the United States Supreme Court has not passed on the question.²⁰⁸ At least one state court recently faced the issue, but its discussion is neither comprehensive nor exhaustive.²⁰⁹ The first amendment objection could also be raised when church buildings do not comply with local building code restrictions on places of assembly,²¹⁰ or when church activity has become a nuisance,²¹¹ or when sanitary requirements are not met by religious structures.²¹² The problem has not been solved, but slowly, a pathway is being adumbrated.

In deciding whether a zoning ordinance which regulates the location of churches is a reasonable exercise of police power, the decision should turn on whether the free exercise of religion is outweighed by the public interest in its regulation, after giving due weight to the preferred position occupied by the first amendment within our constitutional scheme of things.²¹³ It appears that when churches are excluded from a municipality as a whole, rather than from a single zone within a city, there is less likelihood that reasonable alternative locations exist, and first amendment objections might be persuasive. However, the first amendment probably ought not pre-empt churches from being excluded from any single zone within a city, nor prevent applications to them of building, fire, sanitary and other regulatory laws which apply to all buildings in the zoning district.²¹⁴

²⁰⁸ In *Village of Euclid v. Ambler Realty Co.*, *supra* note 18 at 385, the ordinance contained restrictions on churches, but the Court did not discuss their validity for want of allegations that they were harmful to plaintiff. Had the Court wished, it could have passed on the problem for it was presented in *Minney v. City of Azusa*, 164 Cal. App.2d 12, 330 P.2d 255 (1958), but instead, it dismissed for want of a federal question, 359 U.S. 436 (1959); the same fate was accorded, *Corporation of Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v. Porterville*, 338 U.S. 805 (1949).

²⁰⁹ *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. Sup. Ct. 1959) (striking the zoning provision); compare, *Brindel, Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627 (1957) with Note, 70 HARV. L. REV. 1428 (1957).

²¹⁰ See *Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954).

²¹¹ The issue was not raised and the injunction issued. *Portage Township v. Full Salvation Union*, 318 Mich. 693, 29 N.W.2d 297 (1947), *appeal dismissed*, 333 U.S. 851 (1948).

²¹² *Kurman v. Zoning Bd. of Adjustment*, 351 Pa. 247, 40 A.2d 381 (1945).

²¹³ See McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

²¹⁴ See *Congregation of Jehovah's Witnesses v. Brasman*, 30 N.J. 273, 152 A.2d 569 (1959), and Note, 70 HARV. L. REV. 1428, 1437 (1957). I do not deal with the "denial-of-the-equal-protection-of-the-laws" argument. For it, see *Ellsworth v. Gercke*, 62 Ariz. 198, 156 P.2d 242 (1945).

The weight of authority has not discussed the constitutional issue, and generally, zoning ordinances which wholly exclude churches from residential districts have not been approved.²¹⁵ The most usual position has been that churches can be zoned out of first-class residential zones "only on the basis of traffic or other hazards substantially related to public health or safety,"²¹⁶ other justifications being held unreasonable. California has rejected the weight of authority and commendably reasons that churches may be excluded from any zone so long as the measure is non-discriminatory within the district in that it prospectively treats all religious groups alike.²¹⁷ The Washington court has not passed squarely on this problem. Recently, it noted both positions in a case involving a collateral issue.²¹⁸ When supporting its opinion however, the court cited cases only embodying the majority view.²¹⁹ The presence of these citations and dicta ought not prejudice a full and clear consideration of the matter when the issue is presented to the court.

Perhaps clearer than the right to regulate church locations, is the right of Washington municipalities to regulate and locate businesses.²²⁰ So long as operations from "any business or activity" has potentially detrimental influences to the public, morally or otherwise, the matter "is subject to regulation, to the end that the potential, detrimental influence be removed."²²¹ To that end, and on the authority of the

²¹⁵ See *Young Israel Organization of Cleveland v. Dworkin*, 105 Ohio App. 89, 133 N.E.2d 174 (1956); *Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. 1956); *State ex rel. Roman Catholic Bishop of Reno v. Hill*, 59 Nev. 231, 90 P.2d 217 (1939); *North Shore Unitarian Soc'y v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951).

²¹⁶ See *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 382, 312 P.2d 195, 197 (1957).

²¹⁷ *Corporation of Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v. City of Porterville*, 90 Cal. App.2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949).

²¹⁸ *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, *supra* note 216.

²¹⁹ *Id.* at 384-385, 312 P.2d at 198-199. To be distinguished from churches are religious schools which, for zoning purposes, are equated with public schools. See, e.g., *Andrews v. Board of Adjustment*, 30 N.J. 245, 152 A.2d 580 (1959); *Brindel, Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627 (1957), and *Seitz, Constitutional and General Welfare Considerations in Efforts to Zone Out Private Schools*, 11 MIAMI L.Q. 68 (1956).

²²⁰ *But see Hogue v. Port of Seattle*, 54 Wn.2d 799, 341 P.2d 171 (1959), and *Note*, 35 WASH. L. REV. 204 (1960) for problems faced by an agency seeking to promote diversity in Western Washington economy by converting agricultural into industrial lands.

²²¹ *Brennan v. City of Seattle*, 151 Wash. 665, 669, 276 Pac. 886, 887 (1929); *accord*, *State ex rel. Sayles v. Superior Court*, 120 Wash. 183, 206 Pac. 966 (1922) (regulating pool halls); *Asakura v. City of Seattle*, 122 Wash. 81, 210 Pac. 30 (1922) (regulating

Slaughter House Cases,²²² the Washington court early held the City of Spokane to have been properly authorized by statute wholly to exclude tanneries and slaughter houses within its city limits.²²³ A city has been held to have exercised its police power reasonably when it regulates the location and operation of lumber yards so long as the zoning ordinance does not "destroy or prohibit the continuance of an established and otherwise lawful business."²²⁴ Likewise, hospitals can properly be zoned out of certain use districts where "the presence of such an institution in a residential portion of the city would practically destroy the value of property within its immediate vicinity for residence purposes."²²⁵ But, hospitals and other businesses probably stand on considerations different from those regarding slaughter houses, and being both legitimate and necessary for community welfare, they probably cannot be absolutely prohibited within city limits. Presumably, such an ordinance would constitute an unreasonable exercise of the police power.²²⁶

A different ground sometimes used to invalidate zoning provisions is that the use district classifications have not been based on reasonable distinctions, resulting either in a deprivation of property without due process of law or a denial of the equal protection of the laws.²²⁷ These are proper issues at a trial, and if evidence is conflicting on them, then a judge may personally survey the area before deciding

pawnbrokers); *Manos v. City of Seattle*, 146 Wash. 210, 262 Pac. 965 (1927); and *Bungalow Amusement Co. v. City of Seattle*, 148 Wash. 485, 269 Pac. 1043 (1928) (dancehalls). Compare, *City of Seattle v. Dencker*, 58 Wash. 501, 108 Pac. 1086 (1910); *State ex rel. Lane v. Fleming*, 129 Wash. 646, 225 Pac. 647 (1924).

²²² *Supra*, note 114.

²²³ *City of Spokane v. Robison*, 6 Wash. 547, 33 Pac. 960 (1893).

²²⁴ *State ex rel. Modern Lumber & Millwork Co. v. MacDuff*, 161 Wash. 600, 613, 297 Pac. 733, 737 (1931), adhered to in 161 Wash. 703, 297 Pac. 738 (1931). Cities can assign curb slots to taxicabs at railway stations notwithstanding the fact that the more distant assignments are relatively less profitable. *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472 (1913); *But see Seattle Taxicab & Transfer Co. v. City of Seattle*, 86 Wash. 594, 150 Pac. 1134 (1915).

²²⁵ *Shepard v. City of Seattle*, 59 Wash. 363, 373, 109 Pac. 1067, 1070 (1910). (To protect the public from spreading disease, but query, this was a mental hospital to check mental disease?). See, also, *City of Spokane v. Coon*, 3 Wn.2d 243, 100 P.2d 36 (1940); *Park v. Stolzeise*, 24 Wn.2d 781, 167 P.2d 412 (1946).

²²⁶ See reasoning developed in cases in note 225 *supra*, and *State ex rel. Warner v. Hayes Inv. Corp.*, 13 Wn.2d 306, 125 P.2d 262 (1942), and cases in note 221 *supra*. As "regional planning" progresses, a municipality might exclude an otherwise "legitimate" business since it could better function elsewhere as part of a larger social and economic area. See, *Duffcon Concrete Products, Inc., v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

²²⁷ WASH. CONST. art. I, §§ 3, 12. However, regarding these, the court once said: "Indeed, the provisions of the federal and state constitutions relied on do not apply to legislative enactments in the exercise of the police power." *State ex rel. Lane v. Fleming*, 129 Wash. 646, 648, 225 Pac. 647 (1924).

matters.²²⁸ A leading case is *State ex rel. Warner v. Hayes Inv. Corp.*²²⁹

The case dealt with a 1939 ordinance passed by the King County Board of Commissioners which zoned, for the first time, the entire west shore of Lake Washington between Seattle and Kenmore, classifying the lands as first class residential uses only. Plaintiff, a property owner near Sand Point, sought to abate as a nuisance defendant's use of water front land as a bathing beach and trailer camp. Other than nearby farm lands, the remaining land within the immediate vicinity of defendant was either undeveloped, or used for residences, except for a small business and industrial area around the Naval Air Station. Three engineers from the planning commission testified that the basis of the classification was the wishes of the people in the vicinity, but the court could locate "no showing that the zoning of the area in question as a first-class residence district is . . . reasonably necessary or requisite in the interest of health, safety, morals and the general welfare."²³⁰ This holding which relies on the then existing lack of development of surrounding lands, was entirely unnecessary for earlier the court had found that, "even if the beach did have the effect upon adjacent property as alleged, it would not be thereby classed as a nuisance."²³¹ Indeed, apart from being unnecessary, the holding is unfortunate because it forces planning commissions, when districting areas, to place overly heavy reliance on existing land uses. This uncalibrated requirement is backward oriented, neglecting the fact that proper zoning is equally concerned with the future, and is prospective looking. Zoning is designed to shape existing uses in light of anticipated future needs, and this may well mean changing or curtailing present uses.

There remain, in Washington, other untested and substantial distinctions between residential zones, and questions exist whether they will be upheld as proper exercises of the police powers. Among others, are provisions establishing (1) minimum lot sizes,²³² (2) maximum lot coverage by a building, and hence, maximum floor areas²³³ and (3) minimum yard areas for single family residences.²³⁴ The use of

²²⁸ Chief Petroleum Corp. v. City of Walla Walla, 10 Wn.2d 297, 116 P.2d 560 (1941).

²²⁹ 13 Wn.2d 306, 125 P.2d 262 (1942).

²³⁰ *Id.* at 316, 125 P.2d at 265. "The zoning of this large rural area as exclusively a first-class residence district has no relation to public safety or morals and there is no evidence that the public health or general welfare will be benefited by the zoning."

²³¹ *Id.* at 314, 125 P.2d at 265.

²³² *E.g.*, SEATTLE, WASH., CODE § 26.16.080 (1958).

²³³ *E.g.*, SEATTLE, WASH., CODE § 26.16.100 (1958).

²³⁴ *E.g.*, SEATTLE, WASH., CODE § 26.16.090 (1958). I will not deal with this possibility. Requirements prescribing yard areas for light plus open spaces at the rear of

the minimum lot size is probably the oldest technique of the three, having its origin in a reaction against damage allegedly done by eager real estate developers who tried to squeeze as many lots out of a given tract of land as possible.²³⁵ There is no Washington case squarely passing on whether minimum lot sizes are justifiable exercises of the police power. Other jurisdictions have upheld minimum lot ordinances²³⁶ and uniform floor area standards when applied to the entire municipality.²³⁷ Were the Washington court to approve of these developments it would raise the question of how far might the police power go through zoning in requiring a spacious lot and house? These controls, when exercised over houses, have raised the cry of discrimination and "economic segregation,"²³⁸ amounting to snobbery.²³⁹ Necessarily, such controls do involve economic stratification, and in one sense, zoning is segregation. But, when confronted with these problems the Washington court ought not be shocked by these matters unless it is willing to be "shocked by the entire principle of zoning."²⁴⁰

Another sensitive area is located when cities elect to spend huge sums of money for civic redevelopment, and then try to insure their undertaking by reclassifying and strictly enforcing zoning provisions. The spotlight is then focused on building permits and the retroactive nature of zoning ordinances. Usually, the ultimate social problem for the courts is whether to grant a building permit on the basis of an application which, though proper when made, does not conform to (1) legislation pending at the time of application, or (2) legislation both proposed and enacted after filing the application. These issues usually arise in one of two contexts. The first occurs whenever a city proposes a more restrictive building code, *e.g.*, requiring, for the first

apartments have been upheld, see *Bebb v. Jordan*, 111 Wash. 73, 189 Pac. 553 (1920); *Building Comm'n v. Kunin*, 181 Mich. 604, 148 N.W. 207 (1914); *Eubank v. City of Richmond*, 110 Va. 749, 67 S.E. 376 (1910); 54 WASH. ATT'Y GEN. OP. 94 (1954) (approving constitutionality of density use controls).

²³⁵ *Babcock, Classification and Segregation Among Zoning Districts*, 1954 ILL. LAW FORUM 186, 193. Subdivision laws have easily been avoided; see, *Melli, Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 385.

²³⁶ See 1 YOKLEY, ZONING LAW AND PRACTICE 422 (1953).

²³⁷ The leading case is, *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953). See also Haar, *Zoning For Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953), and McClory, *The Undersized House: A Municipal Problem*, 27 CHI-KENT L. REV. 142 (1949).

²³⁸ Muldoon, *The Practical Background of the Zoning and Planning Problems of the Present and Future*, MASS. L. Q., July, 1958, p. 13.

²³⁹ "People with large homes sometimes don't want small homes in the same community. It's snobbery, it's unneighborly and it's anti-democratic." Am. Soc. of Planning Officials, 16 Newsletter, No. 6 (1950).

²⁴⁰ *Babcock*, *supra* note 235 at 201.

time, that apartment buildings provide space for off-street parking.²⁴¹ These proposals inevitably result in a rash of applications for permits to construct buildings conforming to the then existing code, but not to the proposed changes, and, if allowed, the effect is a perpetuation and extension of the very things the legislature has found inimical to the public interest.²⁴² A second situation occurs when a municipality suddenly receives an application for a building permit which would devote land to a use contrary to the better interests of community development, but, being unforeseen at the time, the use was not expressly prohibited by the zoning code.²⁴³ Can the community protect itself and eliminate these possibly obnoxious uses by a subsequent change in the zoning code, after a building permit application has been filed? The basic legal question is whether the application for a building permit, as opposed to actual construction, should vest rights which may not be divested on the basis of pending or subsequently enacted legislation.

All jurisdictions agree that "there is no such thing as an inherent or vested right to imperil the health or impair the safety of the community,"²⁴⁴ but they split when answering the specific question relating to building permits.²⁴⁵ A New York court has said that "no vested right is created simply by application for a building permit,"²⁴⁶ and Pennsylvania allows a municipality to refuse a building permit for a land use which would be repugnant to a then pending and later enacted zoning ordinance, although conforming to existing regulations when made.²⁴⁷ New Jersey holds that the governing law is that which is prevailing at the time the court renders its decision and not that prevailing at the time of application.²⁴⁸ Consequently, a New Jersey city can both propose and enact zoning changes after applications for permits have been made and then deny pending applications on the basis of the new code.²⁴⁹ Unquestionably, the weight of authority indicates that building permits are not per se protected against revocation

²⁴¹ SEATTLE, WASH., CODE §§ 26.46.030, 26.46.110 (1958).

²⁴² *E.g.*, *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958).

²⁴³ *E.g.*, *Park v. Stolzheise*, 24 Wn.2d 781, 167 P.2d 412 (1946).

²⁴⁴ *City of Seattle v. Hinckley*, 40 Wash. 468, 471, 82 Pac. 747, 748 (1905).

²⁴⁵ Note, 34 NOTRE DAME LAW. 109 (1958).

²⁴⁶ *Haussman v. Oatley*, 285 App. Div. 832, 137 N.Y.S.2d 41, 43 (App. Div. 1955).

²⁴⁷ *A. J. Aberman, Inc. v. City of New Kensington*, 377 Pa. 520, 105 A.2d 586 (1954).

²⁴⁸ *Roselle v. Mayor of Moonachie*, 48 N.J. Super. 17, 136 A.2d 773 (App. Div. 1957); *Socony-Vacuum Oil Co. v. Mount Holly Township*, 135 N.J.L. 112, 51 A.2d 19 (1947).

²⁴⁹ See *Cunningham, Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37 (1959).

by subsequent zoning changes.²⁵⁰

Repulsed by the thought of advancing the cause of retroactive ordinances, and attracted by the lure of ease in adjudication, Washington's answer to the question is both simple and clear, and probably results in speculation in building permits:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through... "the moves and countermoves of... of parties... by way of passing ordinances and bringing actions for injunctions"—to which may be added the stalling or acceleration of administrative action in the issuance of permits—to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.²⁵¹

Court protection for property owners at over-all community expense is not absolute. If a building permit is issued by mistake, even the mistake of a city employee, and the building would actually be prohibited by the existing code, then the permit is void. There is no vested right to construct in these circumstances, and the city may remove the building.²⁵² The same result prevails where the permit authorizes a structure beyond the authority of the issuer to grant, and is therefore, in violation of law.²⁵³ Yet, by eliminating all retroactivity in having seized on the time of application as controlling, the Washington court has made paramount the law as it exists at that time, and consequently, derives the notion that even a presently passed zoning ordinance can grant no rights simply because it has been passed, but vests them only on some future date when it becomes effective.²⁵⁴

The Washington position on building permits is confusing when seen in its relation to the Washington view on retroactive zoning measures. Consistently, the court has held to the proposition that a city, in the exercise of its police power, has the right to enact retrospective ordinances affecting existing uses, *e.g.*, compelling a building

²⁵⁰ 8 McQUILLIN, MUNICIPAL CORPORATIONS 357 (3d ed. 1957).

²⁵¹ *Hull v. Hunt*, *supra* note 242 at 130, 331 P.2d at 859; *Park v. Stolzheise* *supra* note 243; *Nolan v. Blackwell*, 123 Wash. 504, 212 Pac. 1048 (1923); *Coffin v. Blackwell*, 116 Wash. 281, 199 Pac. 239 (1921).

²⁵² *Nolan v. Blackwell*, *supra* note 251.

²⁵³ *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959).

²⁵⁴ *State ex rel. Hardy v. Superior Court*, 155 Wash. 244, 284 Pac. 93 (1930).

owner to make changes which would promote safety or reduce fire hazards.²⁵⁵ However, it is fundamental that statutes are not to be construed as retroactive, "unless the retrospective intention is expressed, or can be plainly gathered from the provisions of the act."²⁵⁶ The court will not imply a retroactive intent lightly.²⁵⁷ Nonetheless, property is held subject to valid exercises of the police power,²⁵⁸ as are all contracts,²⁵⁹ and if private rights are restrained by its reasonable exercise then the results are *damnum absque injuria*.

Justifiable fears reside in a generalized disapproval of retroactive zoning laws.²⁶⁰ They are brought to light when considering the retrospective measures in their relation to nonconforming uses. A nonconforming use of land is one lawfully existing, as distinguished from one merely being contemplated,²⁶¹ on the effective date of the zoning ordinance, but by virtue of the measure, its continuance is not in harmony with the zoning provision and it survives in technical violation of the zoning ordinance.²⁶² The burden of proof is on the land owner to show his right to a nonconforming use, and there is some evidence indicating that these uses may receive constitutional protection, unless the resulting loss is inconsequential.²⁶³ Although Washington has no authorizing statutory provision, zoning enabling statutes of other jurisdictions usually allow for nonconforming uses.²⁶⁴ Their existence is based on the twin assumptions: (1) that nonconforming uses probably could not be abated except by exercise of the power of eminent domain, and (2) that they would rapidly disappear after the enactment of a comprehensive zoning code.²⁶⁵ Needless to say, the belief that nonconforming uses would simply fade away has been

²⁵⁵ City of Seattle v. Hinckley, *supra* note 244, approved in Coffin v. Blackwell, *supra* note 251.

²⁵⁶ City of Seattle v. Hinckley, *supra* note 244 at 470, 82 Pac. at 748.

²⁵⁷ Compare cases cited *supra* note 255.

²⁵⁸ E.g., Miller v. Schoene, 276 U.S. 272 (1928).

²⁵⁹ See City of Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454 (1908).

²⁶⁰ Slawson, *Constitutional and Legislative Considerations in Retroactive Law-making*, 48 CALIF. L. REV. 216 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); 1 YOKLEY, 369-372; Comment, *Retroactive Zoning Ordinances*, 39 YALE L. J. 735 (1930).

²⁶¹ See Town of Wallingford v. Roberts, 145 Conn. 682, 146 A.2d 588 (1958); Martin v. Cestone, 33 N.J. Super. 267, 110 A.2d 54 (1954); and Civic Ass'n of Dearborn Tp. v. Horowitz, 318 Mich. 333, 28 N.W.2d 97 (1947).

²⁶² City of Los Angeles v. Gage, 127 Cal. App. 442, 274 P.2d 34 (1954); WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 403-412 (1958), and Anderson, *The Non-Conforming Use—A Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 214 (1959).

²⁶³ 1 YOKLEY 148 and 369-372.

²⁶⁴ E.g., N.J. REV. STAT. 40:55-48 (1937).

²⁶⁵ Cunningham, *supra* note 249 at 67.

shattered on the rock of reality. Ironically enough, this has been because a comprehensive zoning code often insures their perpetuation. Zoning measures have freed nonconforming uses from competition which, if allowed, would further have complicated the land use pattern, and the nonconforming use survives as a local monopoly, *e.g.*, residential-district gasoline stations, or grocery or drug stores. Observers agree that continuing nonconforming uses heighten growing urban blight, often injure surrounding property values, and help incapacitate meaningful zoning, but no completely satisfactory solution has yet been found.²⁶⁶

A land owner might have a right to a nonconforming use in that an ordinance not allowing them might be held an unconstitutional deprivation of property without a proportionate offsetting factor to the public benefit.²⁶⁷ However, Washington's view accords with the policy of the law in all jurisdictions in that it restricts that right severely. "It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual."²⁶⁸ And ordinances prohibiting an enlargement of a nonconforming use operate prospectively only and are not subject to the same constitutional infirmity.²⁶⁹ The Washington policy is aptly illustrated by *Coleman v. City of Walla Walla*.²⁷⁰ A nonconforming rooming house owner sought permission to convert the structure into a fraternity house. The court noted that the requested change would necessitate using the house for board as well as for rooming, for fraternity social affairs, and might require some structural repairs. These considerations, in the court's opinion, would amount to an extension of a nonconforming use, casting the proposed conversion outside the spirit of zoning laws which seeks to abate nonconforming uses. Consequently, the court denied the requested change.²⁷¹ This commendable judicial aversion to nonconforming uses is evidenced by another, but more questionable, decision.²⁷² A Spokane ordinance

²⁶⁶ See *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42 (1958); Mandelker, *Prolonging the Non-Conforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958); Anderson, *Amortization of Non-Conforming Uses*, 10 SYRACUSE L. REV. 44 (1958); Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955), and Gallagher, *Report of Committee on Zoning and Planning*, 18 NIMLO 372 (1955).

²⁶⁷ A leading case is *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 242 P.2d 505 (1952).

²⁶⁸ *Id.* at 220, 242 P.2d at 508.

²⁶⁹ *Ibid.* See Wallace, *Legal Considerations Incident to Zoning in Bd. of Gov. Res. & Services*, U. of W., Info. Bull. No. 164, at 7 (1954).

²⁷⁰ 44 Wn.2d 296, 266 P.2d 1034 (1954).

²⁷¹ "This is necessarily implied by a zoning plan comprehensive in character." *Id.* at 300, 266 P.2d at 1036. But cf. *State ex rel. Modern Lumber & Millwork Co. v. MacDuff*, *supra* note 224.

²⁷² *Shields v. Spokane School Dist.* No. 81, 31 Wn.2d 247, 196 P.2d 352 (1948).

authorized enlargements of nonconforming uses upon any tract held in single ownership.²⁷³ The school district sought permission to convert a nonconforming elementary school located in a residential district into a trade school having "shops, machinery, noise and fumes." The court held that the requested conversion would be such an abrupt change from its use as an elementary school that it could not be considered an "enlargement" of a pre-existing use, and hence, could not be permitted.²⁷⁴

In addition, many ordinances declare that disuse or abandonment of a nonconforming use will terminate it. There has been no Washington case squarely upholding these measures; however, it is known that a clear intent of abandonment is necessary before the court will abate the use.²⁷⁵ A nonconforming building devoted to a nonconforming use cannot be replaced by a new structure even though it would be devoted to exactly the same nonconforming use.²⁷⁶ And in *Manos v. City of Seattle*,²⁷⁷ the court indicated that granting the right to use a building as a skating rink did not entitle the owner to use it as a dance hall contrary to ordinance, even though the building was originally constructed as a dance hall.²⁷⁸ Further, the fire ordinance cases established the proposition that so long as standards apply equally to all uses, the repair of buildings damaged by fire or other catastrophe can be prohibited.²⁷⁹

Despite Washington's salutary doctrinal development restricting nonconforming uses, it has become axiomatic that old uses never die, nor do they fade away. Given the cost involved, it is unreal to expect condemnation to be very effective. The thought is growing that if

²⁷³ *Id.* at 255, 196 P.2d at 357. This ordinance responded to the court's holding in *State ex rel. Modern Millwork & Lumber Co. v. MacDuff*, *supra* note 244.

²⁷⁴ *Ibid.* This case should be compared carefully to *Liberty Lumber Co. v. City of Tacoma*, 142 Wash. 377, 253 Pac. 122 (1927) holding that two additional lots purchased for lumbershed purposes, adjoining six city lots in a residential district already used for a lumber business did not amount to an "enlargement" of a non-conforming business. But note the later and stricter interpretation of *King County v. Lunn*, 32 Wn.2d 116, 220 P.2d 981 (1948).

²⁷⁵ See *King County v. High*, 36 W.2d 580, 219 P.2d 118 (1950).

²⁷⁶ *State ex rel. Miller v. Cain*, *supra* note 267 (Plaintiff sought to substitute a steel and concrete gasoline service station for a wooden one). This is the prevailing view, *Annot.*, 147 A.L.R. 176 (1943). *Contra* is *Board of Adj. v. Perlmutter*, 131 Colo. 230, 280 P.2d 1107 (1955), approving a change of both buildings and uses from brick manufacture to a shopping center on the theory that the resulting non-conforming use would be more restrictive. Clearly, the non-conforming use is thereby further perpetuated contra to the general plan.

²⁷⁷ 146 Wash. 210, 262 Pac. 965 (1927).

²⁷⁸ *Ibid.* The building was constructed as a dancehall in 1919, then used as a box factory until 1924, and until 1927, the time of application, it was used as a skating rink.

²⁷⁹ *Behrend v. Town of Pe Ell*, 136 Wash. 364, 240 Pac. 12 (1925), and see, RCW 35.80 (abating "unfit" dwellings and structures).

these obstructive uses are to be eliminated at all, then summary termination measures are called for, *i.e.*, retroactivity. The legal doctrines have long been prepared. Before comprehensive planning got off the ground the United States Supreme Court held that an ordinance prohibiting stables in a business area and further requiring their immediate abatement did not take property without due process of law.²⁸⁰ It also upheld a Los Angeles ordinance outlawing brick manufacture within city limits, even though its application caused substantial loss to the owner whose brick kiln had just been annexed.²⁸¹ Seeing this green light, municipalities have been adopting ordinances which require cessation of nonconforming uses after lapse of some given period of time.²⁸² The period of time allowed varies, and the idea is to grant the user time sufficient to amortize his investment costs before terminating the use. Consequently, the period of grace should bear some reasonable relation to the user's investment, else an unfair burden would result. These amortization ordinances are successful, and generally, they have received judicial approval.²⁸³ *City of Seattle v. Martin*²⁸⁴ indicates that the Washington court has not been niggardly in this regard.

That case was one of first impression, and the court sustained an ordinance provision whose effect was to terminate the use of a vacant lot, held on a month-to-month tenancy, for machinery repair work within one year after the date of a zoning classification change that rendered the use nonconforming. The basic question was whether the one-year termination restriction as applied to the lessee was a reasonable exercise of the police power. The court balanced the burden of hardship on the lessee against the public benefit to be derived from terminating the use, and upheld the measure, saying:

The lot is vacant and is rented on a month-to-month basis. Appellant is not being required to tear down a building or to liquidate a large business. As noted heretofore, the ordinance allowed appellant a period of one year to effect the necessary changes in the operation of his business. In that time it would not have been too difficult for him to have made other reasonably satisfactory arrangements for the repair

²⁸⁰ *Reimman v. Little Rock*, 237 U.S. 171 (1915); *City of Seattle v. Hinckley*, *supra* note 244.

²⁸¹ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

²⁸² See SEATTLE, WASH., CODE § 26.10.030 (1958); see also Comment, *Elimination of Non-Conforming Uses*, 35 VA. L. REV. 348 (1949), and Comment, *Elimination of Non-Conforming Uses*, 1951 WIS. L. REV. 685.

²⁸³ Note, 35 WASH. L. REV. 213 (1960) (collecting cases).

²⁸⁴ 54 Wn.2d 541, 342 P.2d 602 (1959).

of his equipment in a more appropriate area.²⁸⁵

The building permit and retrospective zoning cases pose special problems for interim ordinances in Washington. An interim ordinance is one effective between the time the planning process begins and the enactment of a comprehensive zoning code based on such a plan. Its aim is to secure the then existing land use pattern until the comprehensive plan is translated into law. It is not in accordance with a comprehensive plan, for none exists. Often communities bask in apathy and awaken to consider planning and zoning only when threatened with a noxious land use.²⁸⁶ Legislative processes are often slow, and comprehensive plans resting on proper public notice and hearings cannot be made in a day. But communities strictly must follow enabling legislation,²⁸⁷ and if modern zoning measures do not rest on a comprehensive plan, they probably will be deemed unreasonable.²⁸⁸ These considerations are sound; yet, it appears equally sound that Washington cities should be able to protect themselves from objectionable land uses. Interim ordinances might be the solution, if the Washington court were to approve them.²⁸⁹ If not, they should be authorized by statute.²⁹⁰ Interim ordinances provide no more than fleeting solutions at best, and they should be authorized to run only for a specified time, after which, they would automatically become invalid unless reenacted in accordance with a comprehensive plan.

THE BOARD OF ADJUSTMENT

There is another set of cases separate and distinct from those considered above. They originate with the Board of Adjustment,²⁹¹ and the prime distinction here is the difference between dealing with legislative enactments, on the one hand, and administrative decisions on the other. The Board's prime function is to provide flexibility, relaxing zoning restrictions in appropriate cases.²⁹² The Washington legislature

²⁸⁵ *Id.* at 544-45, 342 P.2d at 604.

²⁸⁶ Another reason is business rejection of a city because uncomplicated production appears impossible. Cities seek to remedy this situation quickly; see Am. Soc'y of Planning Officials, *Does Industry Pass Up Your Town?*, 22 Newsletter 21 (1956).

²⁸⁷ *Kline v. City of Harrisburg*, 362 Pa. 438, 68 A.2d 182 (1949), but cf. *A. J. Aberman Inc. v. City of New Kensington*, 377 Pa. 520, 105 A.2d 586 (1954).

²⁸⁸ See RCW 35.63.090, and Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

²⁸⁹ California courts allowed them early; *Miller v. Los Angeles*, 195 Cal. 477, 234 Pac. 381 (1925).

²⁹⁰ This has been done for counties; RCW 36.70.790.

²⁹¹ Webster, *op.cit. supra*, note 262 at 423-437; Jennings & Campbell, *The Board of Adjustment*, B. OF GOV. RES. & SERVICES, U. OF W., Report No. 124 (1953).

²⁹² Sumner, *The Board of Adjustment as a Corrective in Zoning Practice*, 13 NAT'L MUN. REV. 203 (1924).

has met this need, authorizing cities²⁹³ and counties²⁹⁴ to create Boards of Adjustment. These boards are to the zoning system what a safety valve is to a boiler system, but they can function as leaks too. Where they have not been provided for by statute, courts have required cities adopting zoning provisions to furnish the machinery to carry out the spirit and intent of the law under which they create comprehensive zoning codes.²⁹⁵

The Washington statute authorizing county Boards of Adjustment is comprehensive in scope, outlining, *inter alia*, such things as jurisdictional powers, notice, hearing and appeals. But municipalities are empowered only in a most general way to authorize their boards to grant "special exceptions" in harmony with the general spirit of land-use planning.²⁹⁶ Construing the term "special exception," Seattle, in conformity with the traditional pattern, has authorized its board to pass on applications for "special property uses" and "variances."²⁹⁷ The distinction between these two terms is subtle but fundamental.²⁹⁸ A special property use is an "exception" which can be granted by the board only where the facts presented in the application are in accord with the very detailed conditions set forth and found in the ordinance.²⁹⁹ Here, standards are involved to guide the board, and there need be no showing of unnecessary hardship. Examples are temporary nonconforming uses or unusual commercial uses, *e.g.*, television stations which require exceptional height limits. A variance,³⁰⁰ on the other hand, permits a nonconforming use not contrary to the public interest, but one which would otherwise be prohibited by a strict application of the zoning code. Variances are granted to relieve individual hardship, and will issue only after a showing that the literal interpretation and strict application of the zoning provisions would cause undue and unnecessary hardships.³⁰¹ Aside from the power to grant special

²⁹³ RCW 35.63.080.

²⁹⁴ RCW 36.70.810—900.

²⁹⁵ 1 RATHKOPF 599; 1 YOKLEY 121.

²⁹⁶ RCW 35.63.080.

²⁹⁷ SEATTLE, WASH., CODE §§ 26.50.040 (1958). See also Campbell & Jennings, *op.cit. supra*, note 291 at 5.

²⁹⁸ For discussion, see dissenting opinion in Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952), *affirmed*, 16 N.J. 16, 105 A.2d 851 (1954), and 1 YOKLEY 323.

²⁹⁹ See SEATTLE, WASH., CODE § 26.50.050 (1958).

³⁰⁰ Defined for counties in RCW 36.70.030(14); see also Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280 (1955), and Green, *The Power of the Zoning Board of Adjustment to Grant Variances From the Zoning Ordinance*, 29 N. C. L. REV. 245 (1951).

³⁰¹ See RCW 36.70.810 (2); SEATTLE, WASH., CODE § 26.50.060 (1958); Application of Devereux Foundation, 351 Pa. 478, 41 A.2d 744 (1945), *appeal dismissed*, 326 U.S. 686 (1945), and Note, *The Unnecessary Hardship Rule*, 8 SYRACUSE L. REV. 85 (1957).

property uses and variances, a board of adjustment generally has power to review alleged errors in decisions made by building inspectors when denying permits. Both special property uses and variances, although nonconforming, should be distinguished from general nonconforming uses discussed *supra* which existed prior to the adoption of a zoning code. Also, it should be obvious that with the possible exception of "spot zoning," nothing can cause a more general breakdown of a zoning system than an indiscriminate practice of granting variances.³⁰²

The legislature has provided that actions by county Boards of Adjustment are final unless court appeal is taken within ten days by writ of certiorari, prohibition or mandamus.³⁰³ Though uncommon, decisions of municipal boards can first be subjected, by ordinance, to review by their city councils.³⁰⁴ These municipal appeals procedures probably must be followed since Boards of Adjustment are administrative agencies, and the doctrine requiring the exhaustion of administrative remedies would operate.³⁰⁵ However, when reviewing a board's actions, a council acts in a quasi-judicial role and is bound by the board's findings. It cannot constitutionally subject a property owner to the type of policy considerations which it would usually consider while legislating.³⁰⁶ Although the state legislature has not provided statutory authority for further appeals from municipal board actions, there is no doubt that subsequent court review can be obtained by certiorari where there is no plain, speedy and adequate remedy at law.³⁰⁷ If the appeal is allowed, Washington trial courts act "as a court

³⁰² See A.S.P.O., Measure of Variance Activity, Planning Advisory Info. Rep. No. 60 (1954); Comment, *Zoning Amendments and Variations and Neighborhood Decline in Illinois*, 48 Nw. U.L. Rev. 470 (1953); *Administration of Zoning Variances in Twenty Cities*, 30 Pub. Management 70 (1948).

³⁰³ RCW 36.70.890.

³⁰⁴ SEATTLE, WASH., CODE § 26.50.100 (1958). This is not a desirable practice from a zoning point of view and might be unconstitutional. "The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of adoption of the ordinance. . . . To subject individuals to questions of policy in administrative matters would be unconstitutional." State *ex rel.* Ogden v. City of Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899, 902 (1954). Apparently councilmen do this because they believe court processes would be "a great financial burden on persons of modest means." The Seattle Times, p. 47, Col. 8, September 7, 1960.

³⁰⁵ See Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 50 CHI. BAR RECORD 119 (1959), and Peck, *The Scope of Judicial Review of Administrative Action in Washington*, 33 WASH. L. REV. 55 (1958).

³⁰⁶ See *supra* note 304.

³⁰⁷ See State *ex rel.* Lyon v. Board of County Comm'r, 31 Wn.2d 366, 372, 196 P.2d 997, 1000 (1948); consult further, RCW 2.08.010 (original jurisdiction of superior courts and power to issue writs), RCW 2.08.020 (appellate jurisdiction of superior court), RCW 7.16.030 (certiorari equals writ of review, generally), RCW 7.16.040 (grounds for issuing writ of review). A writ of review will not issue to review legis-

of review for error of law and [can] not try the case *de novo*.”³⁰⁸ Consequently, the record made before the board in the first instance becomes all important. Further, the reviewing court cannot disturb the board’s decision unless it either applied erroneous principles of law,³⁰⁹ or plainly abused its discretion in an arbitrary or capricious manner.³¹⁰ However, “the *ultimate* burden of proof relative to alleged arbitrary and capricious zoning action rests upon the zoning authorities and not upon a property owner who is seeking a permit.”³¹¹

The court’s position here might possibly prove unfortunate from a planning point of view, but it spells a lesser burden for an aggrieved land owner. If he can start his case in the Board of Adjustment, and then by certiorari take advantage of his ready access to the courts, he need not bother himself with the usual presumptions and obstacles favoring the validity of an ordinance which would probably plague him had he chosen to sue to enjoin the actions of the governing body. Also, when he appeals to the Board of Adjustment from a denial of a building permit, should the meaning of the ordinance be obscure, he has the argument that, properly construed, his contemplated use is permissible under the measure. If allowed, these arguments conceivably could produce results antithetical to community planning and zoning. But they can be averted if the court were to resurrect the rule that: public officers are presumed to have performed their duties regularly, and the burden of establishing arbitrary and capricious action rests upon the one who asserts it.³¹² Perhaps this was the meaning underlying the court’s action when it italicized the word “ultimate.”

CONCLUSION

In this article I have sought neither to be exhaustive nor definitive in the matters treated, but rather, my attempt here has been to adumbrate considerations relevant to an outline of more effective municipal zoning in Washington. Remaining questions are in abundance.³¹³ Per-

lative acts, but only judicial acts, see *State ex rel. New Washington Oyster Co. v. Meakim*, 34 Wn.2d 131, 208 P.2d 628 (1949), and *Tenny v. Seattle Electric Co.*, 48 Wash. 150, 92 Pac. 895 (1907).

³⁰⁸ *State ex rel. Wenatchee Congregation of Jehovah’s Witnesses v. City of Wenatchee*, *supra* note 216 at 383, 312 p. 2nd at 197.

³⁰⁹ *Ibid.*

³¹⁰ *State ex rel. Ogden v. Bellevue*, *supra* note 304.

³¹¹ *State ex rel. Wenatchee Congregation of Jehovah’s Witnesses v. City of Wenatchee*, *supra* note 216 at 383, 312 P.2d at 198.

³¹² *Id.* at 389, 312 P.2d at 201 (dissenting opinion) and cases cited.

³¹³ *Emerging Legal Issues in Zoning*, PROCEEDINGS OF THE ANNUAL PLANNING CONFERENCE (1954), and Blucher, *Is Zoning Wagging the Dog?* PROCEEDINGS OF THE ANNUAL PLANNING CONFERENCE (1955).

haps solutions to more minuscule inquiries will form stepping stones and provide clues which will fathom the legal implications of the vast problem posed at the beginning of this paper. Current and long-lasting problems facing our polity stem, in the main, from rapid expansions of technological knowledge, increased rapidity of communication and transportation, and more massive numbers of people living closer together, yet possessing increasing mobility. If we are to elucidate solutions, then surely, lawyers must be brought into a fresh and vivified relationship with the wellsprings of creative thought. The necessary legal craftsmanship must assiduously be galvanized, producing novel revelations, rather than restating desultory clichés. The law's pathway in the future is no small endeavor. But social destiny is self-compelled, and we must flagellate our collective legal imagination if we are to accept gracefully the bounty which our future world affords.